IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-5353

RUFUS JUNIOR MINCEY, Petitioner,

v.

STATE OF ARIZONA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF ARIZONA

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_____

The Petitioner, RUFUS JUNIOR MINCEY, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Arizona entered in this case on May 11, 1977, and made final by the order of the Supreme Court of the State of Arizona, denying both parties' motions for rehearing entered on June 28, 1977.

OPINION BELOW

The opinion of the Supreme Court of the State of Arizona, filed May 11, 1977, is reported at ____ Ariz. _____, 566 P.2d 273, and is attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of the State of Arizona was entered on May 11, 1977. A timely motion for rehearing was denied on June 28, 1977, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

* * *

QUESTIONS PRESENTED

1. Did not the admission of evidence obtained in a four-day-long warrantless search of Petitioner's apartment after the apartment had been secured by police violate Petitioner's rights under the Fourth and Fourteenth Amendments to the Constitution?

2. Did not the admission of Petitioner's responses to police questioning made while Petitioner was a patient in the intensive care unit of a hospital violate Petitioner's privilege against self-incrimination, and rights to counsel and due process of law under the Fifth, Sixth and Fourteenth Amendments to the Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal United States Constitutional provisions involved are the Search and Seizure Clause of the Fourth Amendment, Self-Incrimination Clause of the Fifth Amendment, Right to Counsel Clause of the Sixth Amendment and Due Process Clause of the Fourteenth Amendment, the pertinent texts of which are as follows:

Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Amendment XIV, Section I:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Arrest and Search

This Petition arises out of an incident in Tucson, Arizona,

on October 28, 1974, in which an undercover police narcotics officer was mortally wounded. At approximately 2:00 p.m., on that date, undercover officer Barry Headricks went to an apartment leased by Petitioner, Rufus Mincey, accompanied by Charles Ferguson. Officer Headricks wore longish hair, a mustache, a flower print shirt, cowboy boots, levis and a levi jacket to hide his true identity as a police officer. After being admitted into the apartment, an offer to sell narcotics allegedly was made for which Petitioner and Charles Ferguson were later charged. Headricks then left the apartment with the purported purpose of returning with money to pay for the drugs.

Headricks returned to the apartment with nine other plain clothes officers and a deputy county attorney; they intended to enter the apartment by a ruse and thereafter to arrest the occupants of the apartment and seize any evidence. Headricks and another officer went to the apartment door with drawn guns hidden behind their backs. The remaining officers and a deputy county attorney hid in the hallway on either side of the door with their guns drawn as well. The door was opened by John Hodgman.

After Officer Headricks slipped into the apartment, Hodgman attempted to close the door, but the remaining officers forced the door back, pushing Hodgman partly through the wall behind the door. Headricks entered the bedroom at the back of the apartment and shortly thereafter some thirteen shots were heard in rapid succession coming from the bedroom. In the gunfire, Officer Headricks and the two bedroom occupants, Mr. Mincey and Deborah Johnson, were wounded. Charles Ferguson was also wounded by a bullet which passed through the bedroom wall. Once the shooting stopped, Headricks came out of the bedroom, said something like "he's down", and fell to the ground. Mr. Mincey was found lying on his back in the bedroom, unconscious.

The entire incident transpired in a matter of seconds. The three wounded apartment occupants and Officer Headricks were transported to the hospital, and the two remaining occupants of the apartment were arrested and taken away.

After the shootings, the narcotics officers did no investigating; they secured the scene, but waited for a special investigative team of police to arrive. The investigating officers searched the premises and examined the scene over a four day period. They started by "looking for narcotics paraphenalia" and in the course of their search learned that Officer Headricks had died of his gunshot wounds. Investigators searched every room, every drawer and every cupboard in the apartment, inventorying the entire contents of the apartment. Officers remained on duty, and kept the premises secure until the search was completed. No search warrant was obtained, and no reason was offered for not seeking one. A variety of evidence used in the subsequent prosecution was obtained as a result of the search.

Interrogation

Shortly after the shooting incident, while Petitioner was in the hospital emergency room, police Detective Hust arrived at the hospital and removed the handcuffs from him in order to facilitate treatment by the medical staff. Mr. Mincey's condition at that time was described as near to the point of coma and he was breathing insufficiently. Three or four hours later, following surgery, Detective Hust obtained permission from a nurse to interrogate Petitioner, who was then in the hospital's intensive care unit.

Mr. Mincey was unable to talk at the time of the interrogation due to the presence of a tracheal tube inserted down his throat to administer oxygen. He also had a Foley catheter tube inserted through his penis to his bladder, a tube running from his nose down into his stomach to prevent the aspiration of vomit, and was receiving intravenous fluids. In addition to oxygen and intravenous

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fluids, Mr. Mincey had received antibiotic and antitetanus drugs.

Mr. Mincey, being unable to talk, responded to Detective Hust's questions by writing his answers on paper provided by the hospital. Detective Hust did not record the questions he asked, but at a later date attempted to reconstruct the questions from Mr. Mincey's written responses and notes made by the detective the following morning. The interrogations lasted about one hour. The detective twice stopped the questioning when Mr. Mincey either fell asleep or lapsed into unconsciousness or was so exhausted as to be unable to continue, resuming the questioning after a brief pause. Mr. Mincey's confused state of mind is illustrated by the fact that he was not sure whether the same person had conducted the various sessions of questioning.

The detective began the questioning by asking Mr. Mincey to supply information that would help in locating the family of another wounded suspect. The nurse who had authorized the questioning and who had been told that Mr. Mincey was charged with murdering a police officer, told Mr. Mincey that it would help if he cooperated with Detective Hust's questioning. Thereafter, the detective advised Mr. Mincey that he was charged with killing a police officer and advised him of his constitutional rights. Mr. Mincey then advised the detective that he could say no more without an attorney present. The detective continued the questioning despite this and despite some six other requests for an attorney.

During the course of the interrogation, Mr. Mincey twice informed the detective that he was in unbearable pain and several times expressed doubt about his ability to accurately recall what had occurred. The nurse testified that Mr. Mincey had been unable to sleep since the time he entered the intensive care unit, and that she was unsure whether he was under the influence of drugs at the time.

* * *

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Trial and Appeal

At the time of trial, Petitioner, Rufus Mincey, was a twenty-three year old United States Air Force machinist who, prior to the aforementioned incident, had never been charged with a felony. Petitioner was charged with, tried by a jury, and convicted of first degree felony murder (committed in avoiding or preventing a lawful arrest), Ariz. Rev. Stat. Ann. §§13-451, -452 and -453, assault with a deadly weapon, Ariz. Rev. Stat. Ann. §13-249(B), unlawful sale of narcotics, Ariz. Rev. Stat. Ann. §36-1002.02, unlawful possession of a narcotic drug for sale, Ariz. Rev. Stat. Ann. §36-1002.01, and unlawful possession of a narcotic drug, Ariz. Rev. Stat. Ann. §36-1002. He was sentenced to life imprisonment without possibility of parole before serving twenty-five years on the first charge; ten to fifteen years imprisonment on the second, concurrent with the first; five to fifteen years imprisonment on the third, consecutive to the life sentence; five to six years imprisonment on the fourth, concurrent with the third, and two to three years imprisonment on the fifth charge, concurrent with the third.

At trial, Mr. Mincey's attorney moved to suppress the evidence seized in the search of Mr. Mincey's apartment. The motion was denied. Mr. Mincey's attorney also moved to suppress the statements made during Mr. Mincey's hospital interrogation. That motion was granted. However, over Petitioner's objection, the trial court allowed the statements made during his interrogation to be used to impeach his testimony at trial.

On appeal, the Arizona Supreme Court reversed Petitioner's convictions for murder and assault with a deadly weapon because of an erroneous mens rea instruction, and remanded the remaining counts, sentences for which had originally been designed to run consecutively to the life sentence on the murder charge, for resentencing. The Arizona Supreme Court, however, held that the

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evidence obtained in the search and interrogation here challenged was properly admitted. The court found that the search of Petitioner's apartment did not come within the exigent circumstances exception to the warrant requirement, but held that it was justified by a "murder scene exception", discussed in more detail hereafter. In so doing, the court expressly refused to follow the decision of the United States Court of Appeals for the Ninth Circuit in Sample v. Eyman, 469 F.2d 819 (9th Cir. 1972). Further, the court held that Petitioner's responses during his in-hospital interrogation were voluntarily made and, therefore, were properly admitted for impeachment under Harris v. New York, 401 U.S. 222 (1971). Both Petitioner and Respondent timely moved for rehearing of the Arizona Supreme Court's opinion. Both motions were denied on June 28, 1977.

ARGUMENT

ARGUMENT I

THE ADMISSION OF EVIDENCE OBTAINED IN A FOUR DAY WARRANTLESS SEARCH OF PETITIONER'S APARTMENT AFTER THE APARTMENT HAD BEEN SECURED BY POLICE VIOLATED PETITIONER'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

The Arizona Supreme Court upheld the admission of evidence which was the fruit of the warrantless, four day search of Mr. Mincey's apartment. That court ruled the evidence admissible under a state court created "murder scene exception", a warrantless search is lawful where (1) the search occurs at the scene of a serious personal injury with likelihood of death, (2) there is reason to suspect foul play, (3) law enforcement officers were legally on the scene premises in the first instance, (4) the search begins within a reasonable time after officials first learn of the murder or potential murder, and (5) the search is "limited [in scope] to determining the circumstances of death".

State v. Mincey, ___ Ariz. ___, 566 P.2d 273, 283 (1977), slip opinion at 23. The Court conceded that the search of Mr. Mincey's apartment did not "fit within the usual 'exigent circumstances' exception and that there was ample time to secure a warrant". Id., slip opinion at 22. Thus, if the Fourth Amendment does not countenance Arizona's "murder scene exception", the search here was unlawful and the evidence seized therein should have been excluded. Mapp v. Ohio, 367 U.S. 643 (1961).

The United States Court of Appeals for the Ninth Circuit has held the application of Arizona's "murder scene exception" contrary to the dictates of the Fourth Amendment. Sample v. Eyman, 469 F.2d 819 (9th Cir. 1972). And the Arizona Supreme Court expressly refused to follow the holding of the Ninth Circuit. State v. Mincey, ___ Ariz. ___, 566 P.2d 273, 283 & 283 n.4 (1977), slip opinion at 22 and 22 n.4. Thus, unless this Court grants certiorari, one rule of law will govern Arizona defendants who are able to obtain review of their convictions by the Federal Courts, and another will govern Arizona defendants who are denied Federal review under Stone v. Powell, 428 U.S. 465 (1976).

A cogent summary of the principles governing availability of exceptions to the search and seizure warrant requirement appears in Coolidge v. New Hampshire.

> "[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well delineated exceptions'. The exceptions are 'jealously and carefully drawn', and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative'. '[T]he burden is on those seeking the exemption to show the need for it'". Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971) (footnotes omitted).

See also, Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). Again, this Court recently refused to expand the number and scope

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of exceptions to the warrant requirement in United States v. Chadwick, 97 S.Ct. 2476 (1977), where the government sought to expand the automobile exception. The principles there reinforced are important to Mr. Mincey's case.

> "[T]he Fourth Amendment 'protects people, not places . . .;' more particularly, it protects people from unreasonable, government intrusions into their legitimate expectations of privacy." 97 S.Ct. at 2481 (citation omitted).
>
> "The judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.' . . . Once a lawful search has begun, it is also far more likely that it will not exceed proper bounds when it is done pursuant to a judicial authorization 'particularly describing the place to be searched and the persons or things to be seized.' Further, a warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." 97 S.Ct. at 2482 (citation omitted).
>
> "Even though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn. In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority." 97 S.Ct. at 2486.

Here, the search was of Mr. Mincey's residence, where an individual's reasonable expectation of privacy has probably received the longest and most consistent Fourth Amendment protection. The degree of intrusion is manifested by the fact that the search extended over a four day period and included inventorying every item in Mr. Mincey's apartment. Every room, drawer, cupboard, nook and cranny was searched.

The search was remote from and not incident to an arrest within the meaning of Chimel v. California, 395 U.S. 752 (1969). It was not justified by any exigent circumstances making the obtaining of a warrant impractical. Indeed, in Arizona, such circumstances are rare since a judicial warrant may be obtained at any hour of the day or night by telephonic communication. 5 Ariz. Rev. Stat. Ann. §13-1444(c) (Supp. 1973). The searched premises were placed under the exclusive dominion of police authority prior to the commencement of the search.

Further, in this case, the Arizona Supreme Court offers no explanation of the rationale for permitting a "murder scene exception" and none is provided in State ex rel. Berger v. Superior Court, 110 Ariz. 281, 517 P.2d 1277 (1974). Indeed, the only explanation ever offered by the Arizona Supreme Court for creating such an exception was the argument that such warrantless searches were justified by the "need for all citizens and particularly potential victims such as this to effective protection from crime". State v. Sample, 107 Ariz. 407, 410, 489 P.2d 44, 47 (1971), writ of habeas corpus ordered conditionally granted, sub nom. Sample v. Eyman, 469 F.2d 819 (9th Cir. 1972); see State v. Duke, 110 Ariz. 320, 324, 518 P.2d 570, 574 (1974).

The Arizona Supreme Court has simply made an arbitrary determination that cases involving bodily injury are more serious than other cases and require less attention to the protection of individual rights. If Arizona can make such a determination now, then in the future it or other jurisdictions can abolish the search warrant requirement in cases of rape, espionage, treason, extortion, kidnapping, terrorism, arson, counterfeiting, robbery and burglary, each of which is a class of crimes posing serious threats to society.

Who is to say which class of crimes is most serious? The argument that more "effective" protection from crime is needed is an argument which may be made against every restraint the Constitution imposes upon police authority in the interest of personal liberty Moreover, the Arizona Supreme Court has never shown, and it could not show, how its proposed exception to the warrant requirement would

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significantly increase police protection over that permitted by the traditional exigent circumstances exception.

The "murder scene exception" is not a doctrine permitting police entry upon premises. It is a doctrine permitting warrantless searches. In fact, it effectively abrogates any warrant requirement for a particular class of criminal investigations. Rather than encouraging determinations by a neutral, detached magistrate of the reasonableness of a search, Arizona's rule promotes searches based solely upon a police officer's perception of what is "a serious personal injury" and of whether "there is reason to suspect foul play". There is not even a probable cause requirement. The reasons for the search do not have to be explained in advance; they can be reconstructed with the benefit of hindsight.

In some instances, courts have spoken about murder scene exceptions to warrant requirements when their intent was to authorize police to enter premises with the intent of rendering emergency aid. See Root v. Gauper, 438 F.2d 361, 364-65 (8th Cir. 1971). Even if such had been a consideration in the development of the Arizona doctrine, the police here did not enter with the intent of rendering aid to an injured person. They entered with the intent of making arrests. The search itself occurred after the injured people had been removed from the premises.

The police in Mr. Mincey's case knew before the search began that Officer Headricks' injuries had resulted from gunshot wounds. The search, therefore, was not conducted in aid of treatment, as for example might be the case in a poisoning incident.

Arizona's rule places no genuine limitations on the scope of searches. Although the rule purports to limit searches to what is necessary to determine the circumstances of death, here a four day long complete inventory of Mr. Mincey's home was held to come within that limitation.

The search in this case violated the spirit, purpose and letter of the Fourth Amendment. The evidence which derived from that search should have been suppressed.

ARGUMENT II

THE ADMISSION OF PETITIONER'S RESPONSES TO POLICE QUESTIONING MADE WHILE PETITIONER WAS A PATIENT IN THE INTENSIVE CARE UNIT OF A HOSPITAL VIOLATED HIS PRIVILEGE AGAINST SELF-INCRIMINATION, AND RIGHTS TO COUNSEL AND DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

The use of Mr. Mincey's responses to police questioning while in the hospital's intensive care unit violated his privilege against self-incrimination, and rights to counsel and due process of law under the Fifth, Sixth and Fourteenth Amendments to the Constitution. The trial court and the Arizona Supreme Court found the responses to have been obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1964), but sustained their admissibility as within the exception created by Harris v. New York, 401 U.S. 222 (1971). Harris and the decisions which have followed it[1] permit an accused person to be impeached[2] with Miranda violative statements if (1) the statements are inconsistent with the accused's testimony at trial bearing directly on the crime charged, and (2) the statements were obtained under circumstances assuring their trustworthiness and voluntariness. The statements in the case at bench meet neither requirement.

The responses used for impeachment were not inconsistent with Mr. Mincey's testimony at trial. Petitioner testified that he had seen a gun in Officer Headricks' hand when Headricks entered the bedroom. As impeachment, the prosecution offered a statement made in response to a question which asked, did "this guy" who came into

[1] E.g., Oregon v. Haas, 420 U.S. 714 (1975).

[2] Arizona permits prior inconsistent statements to be considered by the jury as substantive evidence. State v. Skinner, 110 Ariz. 135, 515 P.2d 880 (1973).

the bedroom have a gun? The response had been, "I can't say for sure. Maybe he had a gun," and Petitioner indicated that he hadn't been sure whether by "this guy" the interrogator had meant Headricks or the officer who found him after he'd been shot, or what.

Mr. Mincey also testified that at the time Officer Headricks entered the bedroom with his drawn gun, he had no idea the entry was for purposes of making an arrest. The prosecutor offered a statement made in response to a question regarding what Mr. Mincey had meant when he wrote that "all hell turned loose". Petitioner's response, given at a time when he had already been informed that he was under arrest and being charged with the murder of a police officer, was that he meant when the "bust" took place. That response simply indicated that several hours after Headricks entered his bedroom, and after Mr. Mincey had been made aware that Headricks and his companions were police officers, and after Mr. Mincey had been advised that he was under arrest and was being charged with murder of a police officer, Mr. Mincey knew that the commotion had resulted from a police "bust"; it did not indicate what his knowledge or state of mind was at the time of the break-in.

The rationale for permitting an exception to the Miranda exclusionary rule is that the shield provided by Miranda should not be perverted into a license to testify inconsistently or perjuriously. That rationale becomes meaningless if the statements introduced to impeach are not in fact inconsistent. Furthermore, as this Court has recognized, it is basic to the law of evidence that before a prior statement can be used to impeach by inconsistency, the statement must indeed be inconsistent. United States v. Hale, 422 U.S. 171 (1975). And a witness must be given full opportunity to clarify his statement before impeachment testimony may be admitted. The Charles Morgan, 115 U.S. 69 (1885). Neither criterion was met in this case.

Whether or not Mr. Mincey's testimony at trial was inconsistent, his responses to the in-hospital interrogation failed to meet traditional standards of trustworthiness and voluntariness. The statements made in the intensive care unit of the hospital were the direct result of an overborne will. The circumstances under which the statements were made are undisputed.

At times during the interrogation, Mr. Mincey looked exhausted to his interrogator. He had not slept for some time, and at least twice during the interrogation he lapsed into unconsciousness. When a person is fatigued, his will is more easily overborne. E.g., Ashcraft v. Tennessee, 327 U.S. 274 (1946), connected case 322 U.S. 143 (1944).

Petitioner indicated repeatedly that he wished the questioning discontinued, and requested the aid of counsel seven times. The failure to inform a suspect of his right to counsel is a "significant factor" in determining the voluntariness of a statement. E.g., Davis v. North Carolina, 384 U.S. 737, 740 (1966). Even more intimidating is the effect of having one's requests for counsel and that questioning be stopped repeatedly denied, frustrated or ignored. See, e.g., Culombe v. Connecticut, 367 U.S. 568 (1961).

It is further uncontested that the interrogation took place only about four hours after the Petitioner was received in surgery for his gunshot wound. He could not speak. The only sustenance that Mr. Mincey was receiving was through intravenous feeding. The lack of substantial food diminishes one's physical strength and ability to resist. E.g., Davis v. North Carolina, 384 U.S. 737, 746 (1966).

Petitioner was being given oxygen through an oral tracheal tube, a method generally used only for patients in critical condition. He had a nasal gastric tube running from his nose to his stomach to prevent him from aspirating vomit, and Petitioner was catheterized. Mr. Mincey indicated that he was in pain and that the pain was unbearable. Such intense pain also diminishes the

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ability to resist. E.g., Reck v. Pate, 367 U.S. 433, 441-42 (1961).

The only persons who had access to the Petitioner were the police and hospital personnel. Nurse Graham, in whose hands Mr. Mincey's well being was entrusted, encouraged him to respond to Detective Hust's questioning. Isolation from one's friends and from counsel has been consistently recognized by this Court as an important factor to be considered in determining voluntariness. E.g., Sims v. Georgia, 389 U.S. 404 (1967); Haynes v. Washington, 373 U.S. 503 (1963); Fikes v. Alabama, 352 U.S. 191 (1957).

Petitioner expressed uncertainty as to his ability to accurately recall the facts. He had received numerous drugs in an effort to stabilize his condition. Nurse Graham was unsure whether Petitioner was under the influence of drugs at the time of the interrogation. Statements made under the influence of drugs do not meet traditional standards of voluntariness. Cf., Townsend v. Sain, 372 U.S. 293 (1963).

Petitioner's lack of experience with the police is yet another factor to be considered in determining voluntariness. E.g., Haley v. Ohio, 332 U.S. 596 (1948).

Mr. Mincey was helpless. He could not walk away from the police officer or even turn his back on him. He could not even speak to tell him to leave. He could only communicate by laborious writing. His strength was sapped by serious injury and surgery. He was in pain, weak and confused. He asked for counsel and to be left alone, but no one complied; no one came to his aid, not even the one person he should have been able to turn to, his nurse. The questioning continued, unrelenting and without regard to his pleas to stop or for counsel. The police officer would not leave Mr. Mincey alone until he received the statements he was seeking.

Clearly, Petitioner's will was overborne. The above-described factors cannot be considered circumstances assuring the voluntariness or trustworthiness of his statements.

It must be emphasized that all we can be sure of are the Petitioner's protestations and statements, since they were written out. There are no equally accurate records of what questions were asked.

It should also be noted that the trial court here never made a finding that the statements admitted against Mr. Mincey were voluntary, in contravention of Jackson v. Denno, 378 U.S. 368 (1964).

Since Mr. Mincey's hospital interrogation statements do not meet the test of Harris, they should have been suppressed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgmentand opinion of the Supreme Court of the State of Arizona.

RESPECTFULLY SUBMITTED this 26 day of August, 1977.

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IN THE SUPREME COURT OF THE STATE OF ARIZONA
In Banc

STATE OF ARIZONA,
Appellee,
v.
RUFUS JUNIOR MINCEY,
Appellant.

No. 3283

Appeal from the Superior Court of Pima County
(Cause No. A-26666)
The Honorable Mary Anne Richey, Judge
Affirmed in Part and Reversed and Remanded in Part

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By Albert Perry Dover

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By Richard S. Oseran

Attorneys for Appellant

GORDON, Justice:

Appellant, Rufus Mincey, was convicted in a jury trial of murder, first degree, in violation of A.R.S. §§ 13-451, 13-452 and 13-453, assault with a deadly weapon in violation of A.R.S. § 13-249 B, unlawful sale of narcotics in violation of A.R.S. § 13-1002.02, unlawful possession of narcotic drug for sale in violation of A.R.S. § 36-1002.01, and unlawful possession of narcotic drug in violation of A.R.S. § 36-1002. He was sentenced to serve a term of life without possibility of parole until twenty-five years are served for Count I; to serve not less than ten nor more than fifteen years for Count II, to run concurrently with the life sentence; to serve not less than five years nor more than fifteen years for Count III, to run consecutively to the life sentence; to serve not less than five years nor more than six years for Count IV, to run concurrently with Count III; to serve not less than two years nor more than three years for Count V to run concurrently with Count III. We have jurisdiction to review this judgment under A.R.S. § 13-1711. The judgment of the trial court is reversed and remanded as to Counts I and II; judgment is affirmed as to Counts III, IV and V but remanded for resentencing.

This appeal arose out of a tragic incident in Tucson, Arizona on October 28, 1974. It began with a planned "buy-bust" by the Metropolitan Area Narcotics Squad, based originally on information from an informant. Although the testimony conflicts in some areas, on appeal we view the evidence in the light most favorable to upholding the verdict. The facts for the purpose of this appeal are as follows:

Sometime around 2 p.m. on October 28, 1974 undercover agent Barry Headricks of the Metropolitan Area Narcotics Squad went to the apartment leased by appellant. Accompanying Headricks was Charles Ferguson, the victim in the assault with a deadly weapon charge. Headricks, according to testimony, looked like a typical undercover narcotics officer: mustache and longish hair, cowboy boots, levis and a levi jacket. He also had an electronic monitering device so that the other agents could overhear what went on.

After Headricks and Ferguson were admitted, a deal was made for the sale of a specified amount of narcotics and both appellant and Ferguson were charged with this sale. While in the apartment Headricks saw a gun in the possession of another man (probably Ferguson) in appellant's apartment. (Also in the apartment was appellant's girlfriend. When the agents returned later there were two more people in the apartment.) Headricks then left the apartment with the purported purpose of returning with the money to pay for the drugs. Actually Headricks met a fellow agent and they and eight other officers prepared to carry out the

prearranged plan to consummate the "buy-bust".[1/]

Headricks and another agent (Schwartz), purportedly his "money man", went up to the door of the apartment with drawn guns hidden behind their backs. Eight other agents and a deputy county attorney were to be waiting with drawn guns out of sight of the doorway; in fact John Hodgman, who opened the door, apparently saw the other agents and tried to close the door. Headricks knocked on the door and when the door opened he announced that it was the police, according to one officer's testimony. Hodgman tried to close the door as Headricks slipped into the apartment. Agent Schwartz prevented the door from closing and he and other agents forced entry. As the door was forced back, Hodgman was pushed partly through the wall behind the door. Schwartz

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1/ A "buy-bust" occurs when the undercover agent or agents make contact with a person who allegedly has illegal drugs for sale and make an offer to buy. If the agent sees the drugs or has enough information to be sure that the person does have the drugs, then an arrest is made. Commonly, as here, the plan is for the agent to leave momentarily and then a number of agents will come back to make the arrests. The usual plan is for the original undercover agent to get the door opened using his undercover identity and then the rest of the agents rush in.

and at least one other agent held Hodgman to the ground and handcuffed him. Schwartz pointed his gun at a woman who was in the room and told her "police, freeze". Moments later another agent pointed his gun at her and, in more obscene terms, told her to freeze or he'd blow her head off. At some time during these occurrences, a number of shots in rapid succession could be heard coming from the bedroom at the back of the apartment which Headricks had entered. It was later shown that both men emptied their guns shooting at each other. (One bullet, later shown to be from appellant's gun, came through the wall and grazed Ferguson's head where he was being held at gunpoint against the wall by another agent. Both men went down to the floor. This incident was the basis of the assault with a deadly weapon charge.) Shortly after the shooting stopped, Headricks came out of the bedroom, said something like "he's down," and fell to the ground. Some agents ran to Headricks to give aid and someone called for emergency assistance. Meanwhile Agent Fuller went to the bedroom door and yelled "police officer, freeze" or "come [illegible]" or something of that nature. Fuller testified that he saw a movement on the other side of the bed and then nothing more. Fuller and another agent entered the room, proceeding along the side walls. Fuller saw a woman lying on a closet floor and asked her if she was all right. When she said no he told her to stay there and help would come soon. Fuller then crawled across the bed and found appellant lying on

his back on the far side of the bed, with no visible wounds and with an automatic pistol under his hand. Appellant failed to respond to speech or to being prodded with Fuller's pistol. When the agents tried to move Mincey they saw blood underneath him and so they left him there until the ambulance came.

No weapons other than the pistol found near appellant's hand were found on any of the suspects. That weapon, a Llama .380 semi-automatic, was found to be empty when one of the agents examined it. Three other weapons were found in the living room during a subsequent search. Headricks' police special .38 revolver was also empty and was later shown to be the weapon which made those bullet holes not shown to have been caused by appellant's gun. When Headricks was taken out on a stretcher, a small semi-automatic pistol was found on the floor under where his body had been. Testimony at trial speculated that he had been carrying this second pistol in his belt at his back as is a common practice among undercover narcotics agents. The presence of the fourth pistol was not explained at trial, but it apparently had not been recently fired.

After the shootings, the narcotics agents did no investigating but waited for a special investigative team in accordance with Tucson Police Department procedure. The investigating officers searched the premises and examined the scene over a period of four days. No search warrant

was obtained and no reason appears for not seeking one. Although no witness was absolutely sure, the officers apparently learned of Headricks' death after the search of the scene began.

Three or four hours after appellant arrived at the hospital emergency room, Officer Hunt interrogated him in the intensive care unit. Appellant was being fed intravenously, had a tube down his throat giving him oxygen to help him breathe, a tube in his nose down into his stomach to keep him from vomiting, and a catheter tube to his bladder. A nurse in the intensive care unit allowed the police officer to question appellant although appellant was unable to talk and had to answer by writing notes. Some of these answers were used in an attempt to impeach appellant by prior inconsistent statements at trial. Appellant was in pain but there is no evidence that he was sufficiently under the influence of medication to render his statements involuntary and inadmissible.

The interrogation began with questions concerning another wounded suspect. Then appellant learned he was charged with killing a police officer and was given his Miranda rights. The trial court granted appellant's motion to suppress this interview as to its use in the prosecution's case in chief but allowed its use for impeachment purposes. The interrogation lasted about one hour but the officer twice stopped the questioning when appellant either fell

asleep or lapsed into unconsciousness.

On November 1, 1974 appellant was charged in a five-count indictment and on June 12, 1975 a jury returned guilty verdicts on all five counts. Appellant's motions for acquittal notwithstanding the verdict and for a new trial were denied and sentence was imposed on July 15, 1975. Thereafter appellant filed a timely notice of appeal to this Court.

Appellant raises a number of issues which we have rearranged and reworded so as to deal with them more concisely:

1. Did the jury instructions present an incorrect mens rea requirement for murder "committed in avoiding or preventing lawful arrest" (A.R.S. § 13-452), thereby compelling reversal?

2. Was it reversible error to permit the state to impeach appellant with statements made by him while he was in the hospital intensive care unit?

3. Was it reversible error to admit evidence that appellant had falsified information on the federal firearms form for appellant's pistol?

4. Was it reversible error to admit statements made by appellant two and one-half months before the incident?

5. Was it reversible error to deny defendant's motion to suppress on the basis of an illegal entry in violation of A.R.S. § 13-1411?

6. Was it reversible error to deny appellant's motion to suppress on the basis of an illegal warrantless search?

7. Was it reversible error to deny appellant's motion

to sever the murder count from the other counts in the indictment?

8. Was the prosecutor's conduct in closing argument so inflammatory as to deny appellant a fair trial?

Mens Rea for the Murder Charge

Appellant was charged with murder "which is committed in avoiding or preventing lawful arrest", A.R.S. § 13-452. He alleges error in terms of the propriety of certain jury instructions but the underlying issue concerns the mens rea required for this kind of murder. This is an issue of first impression before our Court.

One challenged instruction reads:

> "If a person has knowledge, or by the exercise of reasonable care should have knowledge, that he is being arrested by a peace officer, it is the duty of such a person to refrain from using force (or any weapon) to resist such arrest.
>
> "However, if you find that the peace officer used excessive force in making the arrest, it is not the duty of such person to refrain from using reasonable force to defend himself against the use of such excessive force." (Emphasis added.)

The other challenged instruction reads:

> "A person who knows or has reason to know that he is being illegally arrested may use such force, short of taking life, as is necessary to regain his liberty. A person resisting an illegal arrest may use only that force reasonably necessary to effect that purpose.
>
> "A person who knows or has reason to know that he is being lawfully arrested has a duty to refrain from using any force to resist arrest." (Emphasis added.)

We agree that these instructions do not present the proper mens rea or scienter requirement for this kind of first degree murder. The provision of A.R.S. § 13-452 under which appellant was charged does not expressly provide a scienter requirement. The rule, barring a few exceptions, is that wrongful intent or mens rea is required before there can be criminal punishment. State v. Cutshaw, 7 Ariz.App. 210, 437 P.2d 962 (1968); Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951). The exceptions occur only when the legislative power has expressly so determined, as where criminal negligence takes the place of the intent requirement. State v. Chalmers, 100 Ariz. 70, 411 P.2d 448 (1966). Where the penal statute fails to expressly state the necessary element of scienter, this Court may infer the

scienter requirement from the words of the statute plus legislative intent. State v. Berry, 101 Ariz. 310, 419 P.2d 337 (1966).

We hold that the scienter requirement for first degree murder "which is committed in avoiding or preventing lawful arrest," A.R.S. § 13-452, is knowledge that the victim was a law enforcement officer. That is, a defendant is guilty under § 13-452 if the murder is committed while knowingly avoiding or preventing a lawful arrest. This holding is based on the words of the statute and the legislative intent.

The words of this provision are similar to A.R.S. § 13-541 A, Resisting, delaying, coercing or obstructing public officer. This statute uses both the terms "wilfully" and "knowingly" in various provisions. We agree with the Court of Appeals that § 13-541 requires knowledge on the part of the defendant that the other person is a public officer. State v. Tages, 10 Ariz.App. 127, 457 P.2d 289 (1969). It is logical to assume the Legislature intended a similar knowledge requirement in § 13-452.

Even more persuasive is the fact that we are dealing with a first degree murder statute which carries the most drastic penalty in our system of criminal justice -- death. Such a penalty has traditionally required criminal intent as the mens rea, and a lesser mental state such as criminal negligence is covered in a manslaughter statute. E.g., A.R.S. § 13-456. Our statute defining first degree murder, A.R.S.

§ 13-452, was amended in 1973 to add the avoiding or preventing lawful arrest provision. Preceeding this provision is the provision for wilful, deliberate or premeditated killing and following it is the felony murder provision. The first provision by its terms requires scienter, and the felony murder provision requires an intent to commit the underlying felony. State v. Akins, 94 Ariz. 263, 383 P.2d 180 (1963).

In this context the Legislature would not have intended the death penalty for a negligent killing nor would they have intended strict liability for killing a police officer even where the facts otherwise objectively show justifiable homicide. A knowledge requirement for first degree murder committed in avoiding or preventing a lawful arrest is mandated.

In fact, the jury was given a proper instruction because the trial court modified the state's requested jury instruction by adding the word "knowingly:"

> "A murder which is perpetrated by lying in wait or by any other kind of wilful, deliberate and premeditated killing, or which is perpetrated in knowingly avoiding a lawful arrest is murder in the first degree." (Emphasis added.)

So the issue is analogous to our recent decision in State v. Rodriguez, ___Ariz. ___, 560 P.2d 1238 (1977): conflicting jury instructions were given concerning the intent or mens rea necessary for conviction.

In Rodriguez we concluded under the facts of that case that the incorrect instruction was not so prejudicial as to

require reversal. Two crucial facts in this determination were that other than the reading of the instructions, the incorrect instruction was never mentioned to the jury and that the correct intent requirement was "brought home forcefully to the jury in closing arguments no less than six times." State v. Rodriguez, ____Ariz. at ____, 560 P.2d at 1241.

The situation was exactly the opposite at appellant's trial. In closing argument the prosecutor emphasized the incorrect instruction, discussing it at least twelve times. The case went to the jury on an alternative theory of negligence ("knew or by exercise of reasonable care should have known"). Under these circumstances we have no way of knowing on what basis the jury determined appellant's guilt. Conviction under the avoiding arrest section of A.R.S. § 13-452 requires that the jury find the defendant acted knowingly. The jury here could have rendered a guilty verdict on the basis of negligence rather than knowledge.

For the foregoing reasons, we find the giving of the challenged instructions was prejudicial and reversible error. Accordingly, the judgment of the trial court as to Count I (murder, first degree) is reversed. Because the conviction on Count II (assault with a deadly weapon) may involve the same issues discussed supra, the judgment as to Count II is also reversed.

Statements in Intensive Care Unit

Under the circumstances described, supra, appellant was interrogated while in the Intensive Care Unit of the University of Arizona Hospital. Miranda[2/] warnings were given, but after each indication from appellant that he wanted to consult an attorney or that he wanted to stop answering questions, the police officer continued to question appellant.

The United States Supreme Court held in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) that police must cease questioning when the suspect indicates he wishes to assert his right to remain silent or his right to an attorney. This mandate was recently affirmed in Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) and Oregon v. Haas, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); cf. Brewer v. Williams, No. 74-1263 (U.S., Mar. 23, 1977). Statements made in violation of this rule are not admissible in the prosecution's case in chief but may be used for impeachment purposes (if the defendant takes the stand at trial) so long as traditional standards of voluntariness and trustworthiness are met. Oregon v. Haas, supra; Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971).

Prior to trial appellant made a motion to suppress the statements he made while being interrogated at the hospital, arguing their inadmissibility for all purposes because of violations of the requirement of Miranda and because of lack of voluntariness. A hearing was held as required by

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2/ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 94 (1966).

State v. Owen, 96 Ariz. 274, 394 P.2d 206 (1964), and testimony and oral argument were heard by the trial court. The court granted appellant's motion as to use of the statements in the prosecution's case in chief but denied the motion as to use for impeachment purposes.

The court did not make a specific finding as to the voluntariness of the statements. In 1964 the United States Supreme Court held that before a confession can be admitted into evidence, the trial judge must hold a hearing outside the presence of the jury and make a clear finding of voluntariness. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Since then this Court has consistently held that failure to make a definite ruling on voluntariness before admission requires either a remand for the trial court to make such a finding or reversal unless the admission of the evidence itself was harmless error. State v. Marovich, 109 Ariz. 45, 504 P.2d 1268 (1973). This rule applies here because for the purposes of compliance with Jackson v. Denno, supra, there is no difference between confessions and admissions. State v. Owen, supra.

We stated in Marovich, supra, in dictum that denial of a motion to suppress could be tantamount to a finding of voluntariness where it is clear the trial court understood Jackson v. Denno and merely worded the ruling badly. We believe such a situation occurred here. Under the circumstances of this case, it is clear that a finding of voluntariness underlies the trial court's ruling and therefore the lack of such a specific finding is not reversible error.

In this case the prosecutor told the trial court that he did not intend to use these statements in his case in chief, and so his only argument at the hearing was that the statements were voluntary and admissible for impeachment purposes. The United States Supreme Court rule described supra is that to be admitted for impeachment purposes statements which violated Miranda must pass traditional voluntariness and trustworthiness standards. In the context of this case, the trial court's decision to exclude the statements in question for purposes of the prosecution's case in chief but to admit them for impeachment purposes can be based only on an underlying decision that the statements violate Miranda but do not offend traditional standards of voluntariness. We hold the failure to make specific findings, although error, is not reversible error under the specific circumstances of this case.

In addition to the problem of the lack of a specific finding of voluntariness appellant urges this Court to find reversible error because the statements were not in fact voluntary. It is well settled that the trial court's determination of the admissibility of a defendant's statement will not be overturned unless clear and manifest error appears. E.g. State v. Edwards, 111 Ariz. 357, 529 P.2d 1174 (1975). We look to the totality of the circumstances to decide if the statements were properly admitted. State v. Miller, 110 Ariz. 597, 522 P.2d 23, cert. denied, 419 U.S. 1004, 95 S.Ct 325, 42 L.Ed.2d 281 (1974). The evidence in this case is sufficient to support the determination of the trial court.

There was testimony that the nurse in the intensive care unit gave the police officer permission to interrogate appellant and that she was present during the interrogation. She testified that she had not given appellant any medication and that appellant was alert and able to understand the officer's questions. She also testified that neither mental or physical force nor abuse was used on appellant. She said that appellant was in moderate pain but was very cooperative with everyone. The interrogating officer also testified that appellant did not appear to be under the influence of drugs and that appellant's answers were generally responsive to the questions.[3/] The officer testified that he used no force or coercion, neither mental or physical. Nor were any promises made. On the basis of this testimony the admission of the statements for impeachment purposes was not an abuse of discretion.

Appellant also makes some arguments concerning whether the impeaching statements are sharply contradictory to his testimony. These arguments go to the weight and not the admissibility of the evidence.

For the foregoing reasons we uphold the trial court's determination of the admissibility for impeachment purposes

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3/ We might add at this point the fact that appellant was able to write his answers in a legible and fairly sensible fashion provides further support for the trial court's determination.

of appellant's statements made while in the hospital.

Admission of Federal Firearms Form

Appellant argues that admission of the federal firearms form on which he falsely denied he was a heroin addict is improper and inadmissible impeachment by prior misconduct and is irrelevant as well. Appellant admits in his brief, however, that it would be admissible to show intent, citing State v. Schmid, 107 Ariz. 191, 484 P.2d 187 (1971). It would also be admissible, of course, to impeach appellant by a prior inconsistent statement. Both of these bases for admission apply here and the evidence is, therefore, relevant also.

One aspect of the prosecution's case was to attempt to show that appellant had been planning to shoot any police officer who might "hassle" him, thereby negating appellant's self-defense claim. Appellant testified that he thought he had purchased the pistol used in the shooting some three or four weeks prior to the time he had actually purchased it. The implication of that part of his testimony was that the gun had been purchased with no specific purpose. The firearm form was introduced to show that it had been purchased very shortly before the shooting. Cross-examination of appellant also brought out the fact that appellant felt he would be unable to purchase a gun legally unless he lied about being a heroin addict. It is clear that admission of the firearms form is relevant both to the intent issue and to

contradict appellant as to date of purchase, and it was admitted for these purposes.

Appellant also argues that even if this evidence is admissible, it is so highly prejudicial that its admission is reversible error. State v. Little, 87 Ariz. 295, 350 P.2d 756 (1960). The evidence here, however, is not highly prejudicial. The jury already knew that appellant was a heroin addict because of his testimony. Evidence of falsification of a federal firearms form is not sufficiently prejudicial to render inadmissible evidence admissible on two other valid grounds. The admission of this evidence was proper.

Statements Made Two and One Half Months Earlier

Appellant challenges the admission of a witness' testimony concerning a conversation which occurred two and one half months prior to the shooting. The witness testified that appellant said he planned to buy a sawed-off shotgun in case anyone hassled him or in case the pigs hassled him. Appellant, citing Wigmore on Evidence, §§ 394-396, argues that this statement concerning his mental state is inadmissible because (1) it is not a threat against a specific class, (2) there is no showing of a continuing mental state until the time of the shooting, and (3) the shooting incident was not a manifestation of the statement.

The statement in question can reasonably be interpreted as a threat against a specific class: police. Appellant does not argue there is any ambiguity in the meaning of the term "pigs". That people in general were also included does not take away from the specificity of "pigs".

It is well settled that remoteness in time does not control admissibility of such evidence but rather is a factor to be considered by the jury in determining the weight of the evidence. Sparks v. State, 19 Ariz. 455, 171 P. 1182 (1918); State v. Moore, 111 Ariz. 355, 529 P.2d 1172 (1974). It is impossible to set definitive guidelines as to the time limits for evidence of a continuing state of mind. In State v. Moore, supra, we upheld admission of two statements made eighteen months and one year prior to the incident at issue. The time period here is, of course, much less remote and admission of the statement was proper. It is within the jury's province to determine the weight of such evidence.

Similarly, so long as it is a reasonable inference, it is within the jury's province to decide if the shooting incident is a manifestation of the earlier statement. In this case one reasonable inference from the evidence is that the shooting was a manifestation of appellant's earlier statement. The fact that belief in appellant's defense theory would lead one to the opposite inference does not create reversible error or, indeed, any error at all.

Appellant raises some other points but they all go to the weight of the evidence and that is not an issue on appeal. We hold the admission of the prior statement proper.

A.R.S. § 13-1411

Appellant argues that the arrest was illegal due to

noncompliance with A.R.S. § 13-1411 and therefore his motion to suppress all evidence should have been granted. A.R.S. § 13-1411 provides:

> "§ 13-1411. Right of officer to break into building
>
> "An officer, in order to make an arrest either by virtue of a warrant, or when authorized to make such arrest for a felony without a warrant, as provided in § 13-1403, may break open a door or window of any building in which the person to be arrested is or is reasonably believed to be, if the officer is refused admittance after he has announced his authority and purpose."

There was sufficient evidence for the trial court to find that A.R.S. § 13-1411 had been complied with. One officer testified that he heard Officer Headricks say police or something like that when the door was first opened. There was also testimony that at least one other officer announced his authority during the time the officers were trying to push open the door after it had been almost shut. Under all the circumstances of this case there can be no doubt that the person answering the door, when told it was the police, also knew their purpose. If one is in the midst of a drug buy, when the buyer announces that he is a police officer, his purpose is hard to misconstrue.

Appellant also discusses Headricks' entry into appellant's bedroom. That entry is relevant to the self-defense issue but not to A.R.S. § 13-1411 which deals only with breaking into a building not with actions after entry.

We uphold the trial court's denial of the motion to suppress regarding A.R.S. § 13-1411.

Warrantless Search

Appellant argues that the warrantless search of his apartment was illegal in violation of the Fourth Amendment of the United States Constitution. He alleges--correctly --that there were not sufficient facts to fit within the usual "exigent circumstances" exception and that there was ample time to secure a warrant. Thus the issue is whether this Court will adhere to its previous rulings which hold the search of a murder scene under certain circumstances to be a valid exception to the constitutional warrant requirement. State v. Sample, 107 Ariz. 407, 489 P.2d 44 (1971); [4/] State v. Superior Court, 110 Ariz. 281, 517 P.2d

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4/ The United States Court of Appeals for the Ninth Circuit disagreed, Sample v. Eyeman, 469 F.2d 819 (9th Cir. 1972). There are, however, a number of other jurisdictions with some sort of murder scene exception: e.g., Stevens v. State, 443 P.2d 600 (Alaska 1968), cert. denied, 393 U.S. 1039, 89 S.Ct. 662, ___L.Ed.2d ___(1969); People v. Wallace, 31 Cal.App.3d 865, 107 Cal. Rptr. 659 (1973); Patrick v. State, 227 A.2d 486 (Del. 1967); State v. Chapman, 250 A.2d 203 (Me. 1969); State v. Oakes, 276 A.2d 18 (Vt.), cert. denied, 404 U.S. 965, 92 S.Ct. 340, 30 L.Ed.2d 285 (1971); Longuest v. State, 495 P.2d 575 (Wyo.), cert. denied, 409 U.S. 1006, 93 S.Ct. 438, 34 L.Ed.2d 299 (1972). Contra, People v. Williams, 557 P.2d 404 (Colo. 1976). The United States Supreme Court has not disapproved of any of these decisions.

1277 (1974); State v. Duke, 110 Ariz. 320, 518 P.2d 570 (1974).

After reviewing this issue we are reaffirming our rule. We will set some guidelines, however, because we support the principle that "[s]earches conducted without a warrant issued upon probable cause are 'per se unreasonable * * * subject only to a few specifically established and well-delineated exceptions.' Schneckloth v. Bustamonte, 412 U.S. 218 at 219, 93 S.Ct. 2041, at 2043, 36 L.Ed.2d 854, at 858 (1973)." State v. Sardo, 112 Ariz. 509, 543 P.2d 1138 (1975). With the guidelines, infra, in this opinion, search of a murder scene is such a "specifically established and well-delineated exception."

We hold a reasonable, warrantless search of the scene of a homicide -- or of a serious personal injury with likelihood of death where there is reason to suspect foul play -- does not violate the Fourth Amendment to the United States Constitution where the law enforcement officers were legally on the premises in the first instance. We chose not to limit this warrant requirement exception only to actual murders because immediate action may be important to determining the circumstances of death and because a reasonable search should not later be invalidated because the intended murder victim may be saved by a medical miracle. For the ~~search~~ to be reasonable, the purpose must be limited to determining the circumstances of death and the scope must not exceed that purpose. The search must also begin within a reasonable period following the time when the officials first learn of the murder (or potential murder). Cf. State v. Duke, supra.

We find the search of appellant's apartment falls within the murder scene exception to the Fourth Amendment warrant requirement. Although Officer Headricks may not have been dead before the search began, it was reasonable to believe that death was likely and that a murder charge was a possibility. The search was aimed at establishing the circumstances of death (bullet trajectories, e.g.) and included evidence relevant to motive and intent or knowledge (narcotics, e.g.). The search began when the investigative unit arrived, in accordance with Police Department procedures. For these reasons, the search was legal and the trial court's denial of appellant's motion to suppress was proper.

Severance of the Murder Count

Appellant argues it was prejudicial, reversible error for the trial court to deny his motion to sever the murder count from the other counts listed in the indictment. We find no error. So long as the determination is within the guidelines of Rule 13.3 for joinder and Rule 13.4 for severance, of the Rules of Criminal Procedure, 17 A.R.S., it is within the trial court's discretion to deny appellant's motion. E.g., State v. Williams, 108 Ariz. 382, 499 P.2d 97 (1972); State v. Buggs, 108 Ariz. 425, 501 P.2d 9 (1972).

We find Rule 13.3(a)(2) controlling as to joinder in this situation:

"Rule 13.3 Joinder

"A. Offenses. Provided that each is stated in a separate count, 2 or more offenses

may be joined in an indictment, information, or complaint, if they:

* * *

"(2) are based on the same conduct or are otherwise connected together in their commission * * *."

The murder, assault with a deadly weapon, and drug charges were all part of a continuing series of events, and are "otherwise connected together in their commission." Cf. State v. Tynes, 95 Ariz. 251, 389 P.2d 125 (1964).

Rule 13.4(a) provides the standard for severance:

"Rule 13.4 Severance

"A. In General. Whenever 2 or more offenses or 2 or more defendants have been joined for trial, and severance of any or all offenses, or of any or all defendants, or both, is necessary to promote a fair determination of the guilt or innocence of any defendant of any offense, the court may on its own initiative, and shall on motion of a party, order such severance.

* * *

This Court will reverse the denial of a motion to sever only when a clear abuse of discretion is shown. State v. Dale, 113 Ariz. 212, 550 P.2d 83 (1976).

No such abuse of discretion, i.e. prejudice, can be shown here because the evidence as to the other counts would have been admissible at the murder trial even if severance had been granted. The evidence would be admissible on two bases: as relevant to the issue of intent and as part of the complete picture. State v. Schmid, supra; State v. Villavicencio, 95 Ariz. 199, 388 P.2d 245 (1964).

Since we find no prejudice, we hold the denial of the motion to sever was proper.

Prosecutor's Closing Argument

Appellant points to a single statement in the prosecutor's closing argument and argues that it is so inflammatory and prejudicial as to deprive him of a fair trial:

"Don't tell every heroin pusher in town that he can have a gun; that he can have it loaded; that he can shoot a pig if he feels hassled and that all he need do, is take the witness stand and say, 'Yes, sir; no sir,' and claim that he had no idea that he was shooting a cop."

The rule in Arizona is that counsel may draw reasonable inferences from and appraise evidence which was adduced at trial. State v. King, 110 Ariz. 36, 514 P.2d 1032 (1973).

The statement in question is based on the evidence. There was testimony that appellant was a heroin dealer, that he had a loaded gun, that he shot a police officer, and his defense was that he had no idea that he was shooting a police officer. It is a reasonable inference, if the evidence pointing to appellant's guilt is believed, that acquitting appellant might

indicate to other heroin sellers that they could get away with the same thing.

The problem with the prosecutor's statement is that it is an emotional appeal to the jury's fears. Although in closing argument both counsel have wide latitude, State v. Landrum, 112 Ariz. 555, 544 P.2d 664 (1976), such an appeal to fear is improper. Cf. State v. Makal, 104 Ariz. 476, 455 P.2d 450 (1969); State v. Huson, 73 Wa.2d 660, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096, 89 S.Ct. 886, ___L.Ed.2d ___(1969). We need not determine, however, whether it was so prejudicial as to require reversal because we are reversing on other grounds, supra. If the murder and assault charges are retried on remand, we urge counsel to refrain from appeals to juror's fears.

Conclusion

For the foregoing reasons, the judgment of the trial court as to Counts I (murder, first degree) and II (assault with a deadly weapon) is reversed and remanded for proceedings consistent with this opinion. The judgment of the trial court as to Counts III, IV and V (unlawful sale of narcotics, unlawful possession of narcotic drug for sale and unlawful possession of narcotic drug, respectively) is affirmed. Because

the sentence for Count III was to run consecutively to that of Count I (IV and V were concurrent with III) we are remanding on Counts III, IV and V for resentencing.

FRANK X. GORDON, JR.
Justice

CONCURRING:

JAMES DUKE CAMERON
Chief Justice

FRED C. STRUCKMEYER, JR.
Vice Chief Justice

HAYS, specially concurring.

I concur with the majority in all respects except that I take exception to the characterization of the county attorney's statement in argument as being "an emotional appeal to the jury's fears." If oral argument at the close of the case is to have any purpose, it must be more than a dull and sterile discussion of the evidence. The condemned statement is based on the evidence and the inference drawn therefrom is reasonable. It does not deprive the defendant of legitimate defenses nor does it exceed the bounds of propriety.

JACK D. H. HAYS
Justice

I concur.

WILLIAM A. HOLOHAN
Justice

Phoenix
85007

June 29, 1977

STATE OF ARIZONA, Appellee, vs. RUFUS JUNIOR MINCEY, Appellant.	)	Supreme Court No. 3283 Pima County No. 26666

The following action was taken by the Supreme Court of the State of Arizona on June 28, 1977 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing (Attorney General) - DENIED.

FURTHER ORDERED: Motion for Rehearing (Appellant) - DENIED."

Copy of Order Affirming in Part and Reversing and Remanding in Part enclosed.

CLIFFORD H. WARD, Clerk
By Mary Ann Hopkins
Deputy Clerk

TO: Hon. Bruce E. Babbitt, Attorney General, 159 Capitol Building, Phoenix, Arizona 85007
Heather A. Sigworth, Assistant Attorney General, 100 North Stone, Suite 1005, Tucson, Arizona 85701
Stephen D. Neely, Pima County Attorney, 111 West Congress, Tucson, Arizona 85701
Richard S. Oseran, Esq., Bolding, Oseran & Zavala, P. O. Box 70, La Placita Village, Tucson, Arizona 85702
Frederick S. Klein, Esq., Klein & Klein, 100 North Stone, Suite 306, Tucson, Arizona 85701
Rufus Junior Mincey, Arizona State Prison, Box B-34490, Florence, Arizona 85232

JL 1 '77 Rec'd

dkb

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5353

RUFUS JUNIOR MINCEY,

Petitioner,

—*vs.*—

ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

PETITION FOR CERTIORARI FILED AUGUST 29, 1977
CERTIORARI GRANTED OCTOBER 17, 1977

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5353

RUFUS JUNIOR MINCEY,

Petitioner,

—*vs.*—

ARIZONA,

Respondent.

INDEX TO APPENDIX

RELEVANT DOCKET ENTRIES

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF PIMA

Case No. A-26666

PROCEEDINGS/FILINGS	Date Filed
Warrant for Arrest	11/ 1/74
Motion to Suppress Unlawful Search and Seizure filed by Defendant	1/15/75
Motion to Suppress Involuntary Statements filed by Defendant	1/15/75
Opposition to Motion to Suppress filed by State	1/28/75
Response to State's Opposition to Defendant's Motion to Suppress Search and Seizure filed by Defendant	2/ 4/75
Minute entry of Order denying Motion to Suppress Unlawful Arrest; denying Motion to Suppress Search and Seizure; granting Motion to Suppress Statements; denying Motion to Suppress Statements for Impeachment; denying Motion to Reconsider Motion to Sever	2/ 7/75
Minute entry of Order charging Defendant guilty of first degree murder and guilty of all other charges	6/12/75

IN THE SUPREME COURT OF THE
STATE OF ARIZONA

Case No. 3283

PROCEEDINGS/FILINGS	Date Filed
Opinion of the Court affirming in part and reversing and remanding in part	5/11/77
Motion for Rehearing filed by Defendant	6/12/77
Response to Motion for Rehearing filed by State	6/21/77
Order denying Motion for Rehearing	6/29/77
Order of the Court affirming in part and reversing and remanding in part	7/ 6/77

TPD #827400 (Bunting)

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

No. A26666

STATE OF ARIZONA, PLAINTIFF

vs.

RUFUS JUNIOR MINCEY, DEFENDANT(S)

WARRANT FOR ARREST

TO ALL PEACE OFFICERS IN THIS STATE:

A Complaint, Indictment or Information has been duly filed in this court which accuses

RUFUS JUNIOR MINCEY

and charges that in Pima County:

COUNT ONE
(MURDER—1st Degree)

On or about the 28th day of October, 1974, RUFUS JUNIOR MINCEY, murdered BARRY W. HEADRICKS, all in violation of A.R.S. § 13-451, § 13-452 and § 13-453.

COUNT TWO
(ASSAULT WITH A DEADLY WEAPON)

On or about the 28th day of October, 1974, RUFUS JUNIOR MINCEY, assaulted CHARLES FERGUSON with a deadly weapon or instrument, to wit: a gun, all in violation of A.R.S. 13-249 B, as amended.

COUNT THREE
(UNLAWFUL SALE OF NARCOTICS)

On or about the 28th day of October, 1974, RUFUS JUNIOR MINCEY, unlawfully offered to sell to another a narcotic drug, to wit: heroin, all in violation of A.R.S. § 36-1002.02.

COUNT FOUR
(UNLAWFUL POSSESSION OF
NARCOTIC DRUG FOR SALE)

On or about the 28th day of October, 1974, RUFUS JUNIOR MINCEY, unlawfully possessed for sale a narcotic drug, to wit: heroin, all in violation of A.R.S. § 36-1002.01.

COUNT FIVE
(UNLAWFUL POSSESSION OF A
NARCOTIC DRUG)

On or about the 28th day of October, 1974, RUFUS JUNIOR MINCEY, possessed a narcotic drug, to wit: heroin, all in violation of A.R.S. Section 36-1002, as amended.

The court has found reasonable cause to believe that such offense(s) were committed and that the accused committed them, and reason to believe that the accused will not appear in response to a summons, or that a warrant is otherwise appropriate.

YOU ARE THEREFORE COMMANDED to arrest the accused and bring him before this court to answer the charges. If this court is unavailable, or if the arrest is made in another county, you shall take him before the nearest or most accessible magistrate. You may release him if he posts a secured appearance bond in the amount of to be set at Int Opp dollars.

Given under my hand and seal on November 1, 1974, at the direction of the court.

FRANCIS C. GIBBONS
Clerk of the Superior Court

By /s/ [Illegible]
Deputy Clerk

CERTIFICATE OF EXECUTION

I certify that I arrested Rufus Mincey at 10:20 a.m. on Nov. 5, 1974, and presented him before Judge ——— at ———.

Will be presented when possible.

Tucson P.D.
Agency

/s/ Det. L. Hust
Deputy Sheriff/Officer

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

No. A-26666

[Title Omitted in Printing]

MOTION TO SUPPRESS
UNLAWFUL SEARCH AND SEIZURE

COMES NOW the Defendant, RUFUS JUNIOR MINCEY, by and through his attorney, RICHARD OSERAN, and respectfully moves this Court for an order suppressing any and all evidence seized as the result of a search conducted at The Colony Apartments, Apartment 211, located at 1150 East Eighth Street, Tucson, Arizona, for the reasons and grounds set forth more fully in the attached *Memorandum* and the facts that will be adduced at the hearing of this matter.

FACTS

On October 28, 1974, Officer Headricks, in the company of six other plainclothed police officers with guns drawn knocked on the door of Apartment 211 at The Colony Apartments located at 1150 East Eighth Street. The purpose of the officers was to effect the warrantless probable cause arrest of the apartment's occupants. When the door of the apartment was opened, Officer Headricks stepped inside, Officer Schwarz attempted to follow Officer Headricks through the door, before he could get through the doorway, the door was slammed on him. Officer Schwarz forced the door open and almost immediately thereafter shots were heard in the bedroom. After the shooting had ceased, Officer Headricks and three of the apartment occupants lay wounded and the remaining two occupants were in the custody and control of the six other officers. The six officers then present conducted no search and did nothing further in regard to the apartment. Officer Fuller testified at the grand jury proceeding to the following:

Question: OK, what occurred then after you went back in the living room? What did you do?

Answer: I yelled for somebody to call Rescue, and an ambulance, and I was told it was already done. Beyond that, it was just a question of waiting. We have departmental policies which indicate any time that there is a shooting incident, that the people involved will secure everything just the way it is and wait until other personnel can arrive and then the other personnel will handle the investigation, so that we aren't investigating our own actions. So, other than wait for medical help, and see that nobody destroyed any of the evidence, just preserve the scene until it was taken off my hands.

Question: In this case, it was the homicide detail of the Tucson Police Department that took over the investigation; is that correct?

Answer: Yes, sir.

(Grand Jury Transcript, Page 30.)

Question: Was the caliber of that weapon, that automatic weapon, later determined?

Answer: I believe so. As I indicated, we—at this point I didn't allow, other than keeping the people secured—there was the male that opened the door and the girl in the living room—other than keeping these people secured, I had my people do absolutely nothing, so we didn't—I didn't even pick the gun up. We didn't conduct any search or anything else. We stopped all operation right there until such time as the investigation, the people who handle it, showed up.

Question: So even a search of the apartments with regard to the presence of narcotics would have been performed by the homicide detail?

Answer: Yes, sir, or people assigned to them, but not any of us that were involved in it.

(Grand Jury Transcript, Pages 35 and 36.)

Detective Morris Reyna of the Tucson Police Department was advised to respond to the apartment where he

was placed in charge of the crime scene. Detective Reyna stayed in and conducted a search of the apartment, which was concluded at 3:00 a.m. on October 29, 1974. At no time did Detective Reyna or any other officer attempt to secure or secure a search warrant.

> Question: Did your detail then take over the investigation from that point? That is, as opposed to the Metropolitan Narcotics Squad investigating the incident?
>
> Answer: Yes, we took complete charge of the investigation.
>
> Question: Did you have occasion to in the course of that investigation search the apartment?
>
> Answer: Yes, sir, I did.
>
> (Testimony of Detective Morris Reyna, Page 57, Grand Jury Transcript.)

MEMORANDUM

"The most basic constitutional rule in this case is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' 1. The exceptions are 'jealously and carefully drawn,' 2. and there must be 'a showing by those who seek exemption * * * that the exigencies of the situation made that course imperative.' 3. '[T]he burden is on those seeking the exemption to show the need for it.' 4." *Collidge* v. *New Hampshire*, 403 U.S. 443, 455 (1971). 1. *Katz* v. *United States*, 389 U.S. 347, 357. 2. *Jones* v. *United States*, 357 U.S. 493, 499. 3. *McDonald* v. *United States*, 335 U.S. 451, 456. 4. *United States* v. *Jeffers*, 342 U.S. 48, 51. *United States* v. *Soriano*, 482 F.2d 469 (1973).

The search of Apartment 211 of The Colony Apartments was not a search incident to a lawful arrest. "A search or seizure without a warrant as incident to a lawful arrest has always been . . . strictly limited . . . It grows out of the inherent necessity of the situation at the time of the arrest." *Chimel* v. *California*, 395 U.S. 752 (1969). This exception has its justification in

the "need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent destruction of evidence of the crime things which might easily happen where the weapon or evidence is on the accused person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest." *State* v. *Madden*, 105 Ariz. 383, 465 P.2d 363 at 364 and 365 (1970). In the present case as in *State* v. *Madden*, *supra*, at Page 365 "plainly, the search was too remote in time . . . to be justified absent a warrant. In *all situations* (emp. sup.) searches made incident to a lawful arrest are limited by the principle that police must, whenever practicable, obtain a judicial warrant atuhorizing the protective search."

It is clear that the "investigating officers" investigating the crime had adequate time to procure a warrant and failed to do so, thus, the search was unlawful.

A case on point is *U.S.* v. *Curran*, 498 F.2d 30 (1974) 9th Circuit in which officers found one and one-half pounds of marijuana in plain view on a table. At the time of discovery, the officers had not secured the house and had not yet accounted for the occupants. "The 50 kilos were not discovered until after the occupants had been arrested and the house had been secured. The 50 kilos were not in the open, but in a closed cupboard. The trial judge suppressed this. It was not within the scope of a search justified by the circumstances" *Curran*, *supra*, at 36. The issue in *Chimel*, *supra*, was whether a warrantless search of the Defendant's house could be justified as incident to the arrest of the Defendant. The Court, in *Chimel*, held that there was no justification in the absence of a search warrant, for extending the search beyond the petitioner's person in the area from which he might have obtained either a weapon or something that could have been used as evidence against him, that the search was therefore unreasonable under the Fourth and Fourteenth Amendments, *Chimel*, *supra*, Page 768.

The only other arguable exception to the general rule that warrantless searches of homes are per se unreasonable, was first found in the United States in *State* v.

Sample, 107 Ariz. 407, 489 P.2d 44 at 47 (1971). "The traditional right of citizens to be free from unreasonable searches and seizures and unreasonable and unnecessary invasions of their privacy is not violated when the premises upon which a deceased victim is found are searched without a warrant. The need for all citizens, and particularly potential victims such as this to effective protection from crime, particularly while in their own home, would indicate that a warrantless search of the premises is not made unreasonable or unconstitutional by the fact that the defendant exercises joint control over the premises." Thus, the exception created seemed to allow the police to search a crime scene where the premises searched was one either controlled or jointly controlled by the deceased victim, and the body of the deceased victim was found on the premises.

The Ninth Circuit, however, reversed *Sample*, *supra*, in *Sample* v. *Eyman*, 469 F.2d 819 (1972). "Appellee concedes and the record below clearly indicates that this was not a search incident to a lawful arrest . . . and under the circumstances present, a search warrant was necessary . . . there was no danger that evidence would be secreted or destroyed since the empty dwelling was being guarded by a policeman. The appellee having given no reason why a warrant could not be obtained, we find the failure to have done so constitutional error."

The Arizona Supreme Court refers to the *Sample* decision in *State* v. *Duke*, 110 Ariz. 320, 518 P.2d 570 (1974), where it refers to the language in *Sample* to immediate searches at the crime scene which were instigated by representations made to officers by the defendant. "Our holding in *Sample* . . . has been disapproved by the Ninth Circuit Court of Appeals . . . we believe, however, that this case is distinguishable from *Sample* . . . in *Sample*, the search occurred two hours or more after the officers first discovered the body of the deceased, and had it moved from the premises . . . in the instant case, the officers at the scene of the crime proceeded to make a search of the area, relying at first on the representations of the defendant that the deceased had committed suicide. *Under these circumstances* (emp. sup.), the contemporaneous warrantless search of the

scene of a crime at the time of the discovery of the body was we believe, reasonable." *Duke*, *supra*, at 572. For the reason that the defendant in *Duke*, *supra*, called the police and invited them into the house it appears that this case, in fact, was based on the defendant's consent to the search.

Nevertheless, it is clear that the present case is distinguishable from *Duke*, *supra*. There was no discovery of a body at the scene, though the victim was wounded at Apartment 211 of The Colony Apartments, he was immediately removed and expired at a later time in a hospital. There were no representations made by the defendant which would spur a search or act as consent to search. A contemporaneous search was not carried out at the scene by the officers, but rather, at a later time, by other officers. The defendant, not the victim, was the sole possessor of the premises searched.

Also, in the present case, the police went to Apartment 211 with the specific intent to conduct an arrest and search, where in *Duke*, *supra*, they were called to the house by the defendant. Any search based on this "crime scene theory", a theory accepted by no jurisdiction, would be limited to those implements used in the commission of the crime and could not evolve into a "general search". In the present case, the warrantless search continued for nearly 12 hours, in which every item in every room of the premises was itemized.

For all of the foregoing, the Court should grant the Defendant's motion.

RESPECTFULLY SUBMITTED this 15 day of January, 1975.

BOLDING, OSERAN & ZAVALA

BY /s/ Richard Oseran
RICHARD OSERAN
P.O. Box 70
La Placita Village
Tucson, Arizona 85702

[Certificate of Service Omitted in Printing]

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

No. A-26666

[Title Omitted in Printing]

MOTION TO SUPPRESS
INVOLUNTARY STATEMENTS

COMES NOW the Defendant, RUFUS JUNIOR MINCEY, by and through his attorney, RICHARD OSERAN, and moves the Court to suppress any and all statements of the Defendant in violation of his rights under the Fifth Amendment of the United States Constitution.

FACTS

On October 28, 1974, at the Arizona Medical Center, Detective Hust of the Tucson Police Department came into contact with the Defendant, Rufus Junior Mincey, shortly after a shooting incident for which the Defendant is charged under Counts One and Two. This initial contact took place in the emergency room after Detective Hust was requested by hospital personnel to remove handcuffs from two suspects. Detective Hust removed the handcuffs from the Defendant while the Defendant was being worked on by doctors and nurses for wounds he received. Shortly thereafter, the Defendant was removed from the emergency room and taken to the intensive care unit where he was interrogated by Detective Hust. The Defendant could not speak due to a tube that was forced down his throat to enable him to breath. The Defendant also was receiving medication and sustenance intravenously. Detective Hust began his interrogation and requested the Defendant to write out his answers because the Defendant was unable to speak.

The detective's questioning began by asking the Defendant to supply information that would be helpful in locating the family of another wounded suspect. The

Defendant was then advised of his rights, and he thereafter advised the detective that he could say no more without a lawyer. The Defendant asked for a lawyer approximately six more times during the course of the interrogation. The questioning did not cease, nor was a lawyer ever provided during the course of the interrogation. Approximately eight times during the questioning the Defendant expressed his uncertainty, as to his ability at that time, to accurately recall the facts of the incident. The Defendant also advised the police officer that he was experiencing unbearable pain.

MEMORANDUM

The Defendant was clearly in the custody of law enforcement officers prior to the time he was interrogated. Any statements, whether exculpatory or inculpatory, made by the Defendant prior to being advised of his Miranda warnings are inadmissible. *Miranda* v. *Arizona*, 384 U.S. 436, at 444 and 445 (1966), 86 S. Ct. 1602, at 1612.

After Detective Hust advised the Defendant of his constitutional rights, the Detective asked the following questions and received the following written responses:

> Question: What do you remember that happened?
> Answer: I remember somebody standing over me saying "move Nigger, move." I was on the floor beside the bed.
> Question: Do you remember shooting anyone or firing a gun?
> Answer: This is all I can say without a lawyer.

At this point, the police may not ask further questions. In the present case, Detective Hust continued his interrogation of the Defendant. Therefore, all statements made by the Defendant, whether exculpatory or inculpatory, are inadmissible.

> "It clearly states in *Miranda* v. *Arizona*, *supra*, that if a suspect indicates in any matter at any stage of the process that he wishes the aid of an attorney, 'there can be no questioning'." *Arizona* v. *Edwards*,

No. 3002 at Page 7, filed December 23, 1974, and *Miranda* v. *Arizona*, 384 U.S. at 445, 86 S.Ct. at 1612.

It is further urged that any statements made by the Defendant be held inadmissible for any purpose. For reasons as set forth in the *Facts* above, the trustworthiness of the evidence does not satisfy legal standards. *Harris* v. *New York*, 401 U.S. 222 at 224, (1971), *State* v. *Dixon*, 15 Ariz. App. 62 at 63 and 64 (1971). Specifically, that the Defendant requested a lawyer seven different times, that he advised the officer eight times that he could not, at that time, clearly recall the facts, that at one time he suggested that "without a lawyer, I might say something thinking it was something else". Also, that the Defendant complained of pain twice, describing it as being "unbearable".

In order for a prior statement to be admitted for impeachment purposes, the statement must be directly, substantially, and materially contradictory to the testimony in issue. *Arizona Law of Evidence*, Udall, Section 63, Page 88. It is further requested that in light of the foregoing, if the Defendant's statements are admissible for any purpose, that the State first make a showing out of the presence of the jury, that Defendant's testimony at trial "contrasted sharply" with such previous statements. *Harris* v. *New York*, *supra.* at Page 225.

It has long been the rule in Arizona that confessions are prima facie involuntary and the burden is on the State to show the confession was freely and voluntarily made. *State* v. *Edwards*, *supra.*, at Page 7.

For all the foregoing, Defendant's Motion to Suppress all Statements of the Defendant should be granted.

RESPECTFULLY SUBMITTED this 15 day of January, 1975.

BOLDING, OSERAN & ZAVALA

By /s/ Richard Oseran
RICHARD OSERAN

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

No. A-26666

[Title Omitted in Printing]

OPPOSITION TO MOTION TO SUPPRESS

COMES NOW the State of Arizona, by and through the Pima County Attorney, DENNIS DeCONCINI, and his Deputy, JAMES M. HOWARD and opposes the defendant's Motion to Suppress based on the unlawfulness of the search and seizure on the ground that any search and seizure occurring herein was performed in accordance with the laws of the State of Arizona and the Constitution of the State of Arizona and the United States.

The attached Memorandum of Points and Authorities is made a part hereof by reference.

WHEREFORE, the State of Arizona respectfully requests that the defendant's Motion to Suppress be denied.

Respectfully submitted this 28th day of January, 1975.

DENNIS DECONCINI
Pima County Attorney

/s/ James M. Howard
JAMES M. HOWARD
Deputy County Attorney

[Certificate of Service Omitted in Printing]

MEMORANDUM OF POINTS AND AUTHORITIES

In the course of arresting occupants of defendant's apartment and of securing medical assistance for Officer Headricks and others injured, officers necessarily entered every room of the apartment and had a right to do so. *United States* v. *Briddle*, 436 F.2d 4 (8th Cir. 1970); *United States* v. *See*, 308 F.2d 715 (4th Cir. 1962). Nothing in *Chimel* v. *California*, 395 U.S. 752, 23 F.2d 685 (1969) alters this right of police officers to secure their arrests by inspection of the premises. See *Briddle*, *supra*.

During the course of these arrests and of securing necessary medical aid for the three wounded persons, any evidence which fell into the officers' open view could be seized. *Harris* v. *United States*, 390 U.S. 234, 236, 19 L.Ed.2d 1067 (19—); *State* v. *Pisee*, 8 Ariz. App. 430, 446 P.2d 940 (1968). In the case at bar two guns and a vial of Heroin clearly fall into this category. Items seized either actually or constructively by the Metro officers. For an example and discussion of constructive seizure see *United States* v. *Glossel*, 488 F.2d 143 (9th Cir. 1973).

Most of the other physical evidence in this case which came from defendant's apartment (spent casings and slugs, blood samples, fingerprints, measurements, photographs, etc.) was "seized" during a homocide-assault scene investigation. The Defendant states unequivocally that there is no such right to investigate a homocide scene. He tried to distinguish *State* v. *Duke*, 110 Ariz. 370, 518 P.2d 570 (1974) from the case at bar. He cannot escape, however, this language:

> "'. . . the traditional right of citizens to be free from unreasonable searches and seizures and unreasonable and unnecessary invasions of their privacy is not violated when the premises upon which a deceased victim is found are searched without a warrant.'"

This language, although quoted from an earlier reversed case, was held again in *Duke* to be the law in Arizona. *Sample* v. *Eyman*, 469 F.2d 819 (1972) is read by the

Arizona Court in *Duke* as requiring only that such a search begin "contemporaneously" with the discovery of the body and that police may not leave for two hours and then return to search. If *Duke* leaves any doubt certainly *State ex rel Berger* v. *Superior Court*, 110 Ariz. 281, 517 P.2d 1277 (1974) does not. The Court held there is a per curium opinion.

> "Where the police are called to the scene of a homicide, they may lawfully investigate such portions of the premises as are reasonably necessary to establish the true facts of the homicide.
>
> The order of the Superior Court suppressing the shell assertedly fired from the murder weapon is vacated." 110 Ariz. at 281, 517 P.2d at 1277.

Regardless of how one reads *Sample* v. *Eyman*, supra, the *Duke* case sets forth the Arizona Supreme Court's interpretation of the Fourth Amendment in this area. The Arizona Courts are not alone in holding that unhampered and immediate homicide scene investigations are reasonable under the Fourth Amendment. The defendant is wrong when he states that *Sample*, supra, is the first case in this area. His assertion that no other jurisdiction allows such warrantless scene investigations indicates a lack of research. In the six jurisdictions where the point has been squarly raised, the Courts have unanimously agreed with the Arizona Court. *Stevens* v. *State*, 443 P. 2d 600 (Alaska 1968); *State* v. *Chapman*, 250 A.2d 203 (Md. 1969); *State* v. *Oakes*, 276 A.2d 18 (Vt. 1971); *State* v. *Wallace*, 31 Cal.App.3d 865, 107 Cal.Rptr. 659 (1973); *Focher* v. *State*, 501 S.W.2d 1921 (Tex. 1973); *People* v. *Newlist*, 43 A.D.2d 150, 350 N.Y.Supp.2d 178 (1973).

As the New York Supreme Court appellate division stated in *Newlist*, supra:

> "Additionally, in dealing with a homicide the police should be accorded a greater leeway both in terms of the element of time and in the permissible scope of their investigation. In the context of this case, the police were not limited to an examination

and search of the immediate area where the body was found (i.e., the bedroom). On the contrary, they had the right, indeed the duty, to examine the "crime scene", which should be deemed to include the entire house. There was here no more than the "legitimate and restrained investigative conduct undertaken on the basis of ample factual justification" (Terry v. Ohio, 392 U.S. 1, 15, 88 S.Ct. 1868, 1876, 20 L.Ed.2d 889). Therefore, that branch of the order of the County Court which suppressed the items taken by the police after their return to the premises should be reversed and the defendant's motion in that respect denied." 350 N.Y. Supp.2d at 185.

The California Court of Appeals in a more lengthy discussion of the subject relied heavily on the Maine and Vermont cases cited above:

"On this appeal defendant argues that the trial court ought to have granted his motion to suppress the knife and the photographs taken by Officer Gray because the search of the kitchen was made without a warrant and was not justified under any of the recognized exceptions to the general rule prohibiting warrantless searches. Defendant's position is untenable.

. . .

The Supreme Judicial Court of Maine upheld the validity of the search and seizure, pointing out that when the police were confronted with circumstances suggestive of homicide, a duty immediately arose to make a thorough investigation to determine whether the decedent was the victim of foul play and if so, by whom and by what means. The court stated: "[W]hen the examination of the premises was resumed, it was but the continuation of a single investigation, a 'continuing series of events,' commenced with a lawful entry and pursued because of the exigency of circumstances. Although the police had from the beginning a reasonable basis for suspecting that a weapon had been used, the actual cause of

death and the element of criminal conduct could not be known or rise above the level of a rational possibility until the weapon was actually found at the termination of the investigation.

"There is no more serious offense than unlawful homicide. The interest of society in securing a determination as to whether or not a human life has been taken, and if so by whom and by what method, is great indeed and may in appropriate circumstances rise above the interest of an individual in being protected from governmental intrustion upon his privacy. In our view this is such a case. We see here no more than the 'legitimate and restrained investigative conduct undertaken on the basis of ample factual justification' which is not proscribed by the Fourth Amendment. Terry v. State of Ohio, supra (1968) [392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889]. The public had a right to expect and demand that the police would conduct a prompt and diligent investigation of these premises to ascertain the cause of this apparently violent death and to solve any crime committed in the course thereof." (pp. 210-211 of 250 A.2d.)

In State v. Oakes, supra, the Vermont Supreme Court, in upholding a search for and seizure of the murder weapon in a homicide case, observed that "The role of the police officer carries with it the duty and responsibility to carry out such an investigation upon the discovery of what appears to be a crime. Once authorizedly on the scene, enforcement officers are under a duty to complete their investigation of the occurrence. Here, even if their original entry had been obstructed rather than solicited, the emergency situation called to their attention would have justified a warrantless entry and investigation of the scene as a part of their authorized duty. [Citations.]" (p. 25 of 276 A.2d.)" *People* v. *Wallace*, supra, 107 Cal.Rptr. at 660, 661, 662.

It appears from these cases and those relied on therein that the great weight of authority holds that warrantless

homicide crime scene investigations, including a search of the premises, the taken of photographs and fingerprints, etc., are to be upheld as reasonable under the Fourth Amendment.

Respectfully submitted this 28th day of January, 1975.

DENNIS DECONCINI
Pima County Attorney

/s/ James M. Howard
JAMES M. HOWARD
Deputy County Attorney

[Certificate of Service Omitted in Printing]

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA, COUNTY OF PIMA

EXCERPTS FROM HEARING ON MOTION TO SUPPRESS—January 31, 1975

TESTIMONY OF BRICE FULLER

[136] DIRECT EXAMINATION

BY MR. OSERAN:

Q Could you state your name for the record, sir?
A Brice Fuller.
Q And how are you employed, Mr. Fuller?
A I am a Lieutenant on the Tucson Police Department.
Q And what is your function as a Lieutenant on the Tucson Police Department?
A I am presently assigned to the uniformed division as a team commander.
Q What was your function on the 28th of October 1974?
A At that time, I was assigned to the Metropolitan Area Narcotics Squad as the commander.
Q And drawing your attention to the afternoon hours of that day, were you at the Colony Apartments on Eighth Street?
A Yes, sir.
Q And what was your purpose in being there?
A We were participating in an investigation of a narcotics case.
Q And was your purpose to in fact effect a buy and then a bust, immediately following of the seller of that narcotics, if in fact the buy [137] was successful?
A Essentially, we had no intention of completing the buy.
Q Then, in fact you went up there for an attempted buy and then a bust situation?
A Yes, sir, we used the ruse of making a buy to determine whether or not the individual did have narcotics.

Q I see, so in other words, at the time you first went to the Colony, you didn't have what is considered to be probable cause to obtain a search warrant, to execute a search of that particular apartment?

A That is correct.

Q So you were in fact, using the ruse of a buy, trying to ascertain that, in fact, the person of apartment 211 at the Colony Apartments had some contraband?

A Yes, sir.

Q And how many other officers participated in the incident of October 28th?

A I believe there were ten officers, total.

Q And was there also, would that be including a County Attorney?

A And one County Attorney.

[138] Q And what was his function?

A He was along as an observer.

Q Did he advise you at any time in regard to your operation of the buy or the bust?

A No.

Q Did there come a time when it was ascertained that in fact, that you in fact had reason to believe that there was contraband in apartment number 211?

A Yes, sir.

Q And were all of the officers involved in this operation in plain clothes?

A Yes, sir.

Q And did some of the officers wear their hair in a longer manner, as would an undercover officer, it would be customary for an undercover narcotics buyer to wear his hair length and clothes? Am I clear or are you confused as I am?

A Most of the officers attempted to dress in a manner similar to the norm for the type of people that they deal with.

Q Which in fact would be a disguise? Some of the officers at least were then disguised so as not to look like police officers?

A A disguise to me means mask or false mustache or things of that nature. They dressed [139] casually, they wear their hair in common, the way it is worn today by a great number of people, yours included.

Q So in other words, they dressed so as they would not look like a police officer might look to carry out their functions?

A Okay, yes.

Q And were all these officers members of the Metro?

A Yes, sir.

Q And could you explain what is meant by Metro?

A Yes, sir, they are members of Metro. The Metropolitan Area Narcotics Squad is a unit consisting of members of the Tucson Police Department, South Tucson Police Department and Pima County Sheriff's Office. It was formed in, I believe, September of 1970, with the intention of providing a unit that could operate to investigate narcotics cases any case within the County.

Q And to make purchases of narcotics and to arrest people involved with narcotics, is that not right?

A Yes, sir.

Q And was Officer Barry Headricks with you on that day?

[140] A Yes, sir.

Q And could you describe his appearance, please?

A The reason, what happened or his physical appearance?

Q Physical appearance, how he was dressed?

A He was wearing, I believe, a blue shirt, a blue levi jacket, blue levis and boots.

Q Cowboy boots or do you recall?

A I don't think they are really cowboy boots, they are more of a round toed casual boot, I believe they were roughout type boots, but I'm not sure.

Q And how was Agent Headricks wearing his hair?

A It was long, a little bit longer than mine, I would say down probably to the bottom of his ears and maybe a little longer in the back.

Q Did he have any facial hair?

A I believe he had a very faint mustache.

Q Did you learn, well, did Officer Headricks at approximately 2:00 o'clock that afternoon or sometime thereafter, gain entry into apartment 211?

A Yes, sir.

Q Did he then come out of that apartment [141] and advise you or other officers, information that he then had, as a result of being in apartment 211?

A Yes, sir.

Q And did you then give an order for the officers to converge on apartment 211?

A Yes, sir.

Q And did you discuss previously at any time your plan in gaining entry into that apartment?

A Yes, sir.

Q And what was that plan?

A At the time that Officer Headricks initially entered the apartment, he was to indicate to the occupants that he was interested in purchasing some narcotics and that a second person was waiting for him down in his automobile, holding the money at that location.

Then, if there were in fact narcotics, he would come down and come back to the apartment, supposedly returning with the money, and, in fact, then when he returned to the apartment and was readmitted, we would enter at this time and make the arrest.

Q I see. So, the plan in effect would be that he would knock at the door, the door would be opened or through any other means, the occupants [142] of the apartment would see that it was Officer Headricks, who they believed to be a buyer of narcotics, and would open the door and allow him to enter into the apartment?

A Yes, sir.

Q And did he in fact knock on the door?

A Yes, sir.

Q And was the apartment opened to allow him to enter?

A Yes, sir.

Q And shortly thereafter or immediately thereafter, was there an attempt made to close the apartment door?

A Yes, sir.

Q And did the other officers then force entry into the apartment?

A Yes, sir.

Q Were you able, were you at the or near the entry to apartment 211?

A Yes, sir.

Q Where were you, do you understand this diagram up here (indicating)?

A Yes, sir, the ones with the numbers.

Q Okay, you take this representation to mean this in fact was apartment 211?

A Do you want to put a compass on there or [143] does it matter?

Q I don't think it really matters, let's say this (indicating) is south and this (indicating) is north?

A In that case—

Q Can you use this pointer and give us your location at the time Sergeant Headricks knocked at the door?

A Right here (indicating).

Q And were any other officers standing between you and Officer Headricks?

A No, Officer Headricks was directly in front of the door and Officer Schwarz, was to his left—

Q Was he making any attempt to conceal himself?

A Not really, he would have been expected back, he would have been the expected person.

Q And where were the other officers?

A Sergeant Wolfe and Mr. Cochran, from the County Attorney's Office, were here (indicating). I don't know in what order in the hall, but the other officers, Morgan and I, and Skuta—

Q Were all on this side?

A On this side (indicating).

Q And we are talking about the east side?

[144] A Yes.

Q And were you and officer Schwarz the only—let me ask you this, were you able to observe and did you observe the doorway at the time Officer Headricks knocked on the door?

A Yes, sir.

Q Okay, and would Officer Schwarz be able to observe the doorway and the door when Officer Headricks knocked on the door?

A Yes.

Q And would any other officer be able to make this observation?

A No.

Q Did Officer Headricks knock in a loud fashion or soft fashion or just a normal sort of a knock?
A I would call it a normal knock.
Q And you could hear that knock, couldn't you?
A Yes, sir.
Q Or do you recall whether or not you in fact heard it?
A I think that I did.
Q It was not a loud knock?
A No, he didn't pound on the door or anything, just knocked.
[145] Q And how long or how much time elapsed from the time he knocked until the door was opened to you?
A I suppose it was just a matter of seconds. There wasn't any undue delay.
Q And did Officer Headricks or Officer Schwarz say anything between the time Officer Headricks knocked and the time the door was in fact opened?
A No, sir.
Q Did you, from the point that Officer Headricks knocked, did you hear Officer Headricks say anything?
A I'm sorry, would you repeat?
Q From the point that Officer Headricks knocked on the door, forward in time, did you hear him say anything?
A No, sir.
Q After Officer Headricks gained entry into the apartment and after it became necessary to force the door open, who next obtained or gained entry into the apartment, what officer?
A Are you referring to who passed the bottleneck of the doorway itself?
Q Yes.
A I would be the second officer.
[146] Q And what was causing the bottleneck?
A The individual who opened the door, immediately tried to close it again and the bottleneck was formed by his pushing to try to shut it and us pushing to try to open it.

Q And did you go over or around the bottleneck?
A Kind of a little of both, I think.
Q And who was causing the bottleneck at the point, who in fact did you go over or around?
A It would be Detective Schwarz.
Q And the person that had opened the door?
A Well, he was behind the door. I don't think he had any contact with him at all, but I went.
Q You just slipped in through, as he was forcing the door open?
A Yes, sir.
Q And did you see who followed you in through the door?
A No, sir.
Q Did you have your weapon in your hand, Officer Fuller?
A Yes, sir.

• • • •

[149] Q Let me jump ahead, I don't think that this testimony is particular relevant to this time. After the shooting had stopped, did you then secure the people in the bedroom and people in the living room?
A Yes, sir.
[150] Q And did you then secure everything the way it was at that point in time, until other officers came to the—
A Yes, sir, at that time, I just announced, when I was sure that everybody was secured and that there was ambulance and rescue units on the way, I just announced that no one was to do anything until we were relieved.
Q Is the reason for that, that you do not investigate your own actions when a shooting has transpired?
A Yes, sir.
Q So in fact, you had observed the weapon in the bedroom, had you not?
A Yes, sir.
Q And you didn't even pick that weapon up, is that correct, sir?
A I didn't, no sir.

Q You just stopped your total operation until the people that would handle it would show up, is that correct, sir?

A Yes, sir.

Q And who were the people that showed up, that you turned your scene over to?

A That I can recall, Lt. Ronstadt of the uniformed division arrived, Captain Holdcroft [151] was there, Major Dupnik was there, Detective Reyna arrived and many other officers. Specifically, I gave the scene to Lt. Ronstadt.

Q At the time of the arrival of the other officers or shortly thereafter, were the wounded persons in the apartment transported to the hospital?

A Yes, sir.

Q Was it just about the time the other officers arrived or—

A Yes, sir, as you can imagine, it was very confusing and the rescue people, and I believe the ambulance people did get there first. But, the other officers were arriving at the same time that they were starting to move. I think before they moved the first wounded person out.

Q So within a matter of moments, after the other officers arrived, the wounded people were moved from the apartment to the hospital?

A Yes, sir.

Q And was one of those wounded people Officer Barry Headricks?

A Yes, sir.

• • • •

[152] Q You did, did you not, sir, have the apartment secured from the point the shooting was finished until the point the other officers and the medical people arrived?

A Yes, sir.

Q And did you learn that approximately one hour after the removal of Officer Headricks, that he in fact expired at the University Medical Center?

A Yes, sir.

• • • •

[153] Q The search of the apartment subsequent, the subsequent search of the apartment did not take place by either yourself or any members of the Metropolitan Area Narcotics Squad that had initially gained entry to make the arrest, is that correct, sir?

A That is correct.

Q The search would have been performed by the homicide detail or the officers to which you turned the scene over to, is that correct?

A Yes, sir.

Q Did you at any time or did anybody, to your knowledge, at any time secure a telephonic or otherwise search warrant?

A For—

Q For anything?

A I didn't and I believe that someone did.

Q There was in fact a telephonic search warrant secured to search a car in the parking area, is that correct, sir?

[154] A I have no personal knowledge of that at all.

Q So you don't know whether or not anybody secured a search warrant and you don't know what, if anybody did secure a search warrant, what in fact it was for, for what area it was for?

A No, sir, not directly. Like I say, I have heard talk, but I was not involved.

Q You yourself have never seen any search warrant?

A No, sir.

Q For the premises?

A No, sir.

Q Where were you when you learned that Officer Headricks had in fact expired?

A In the apartment.

Q And was the homicide detail searching the apartment at that time or had control of the apartment at that time?

A They had control. I don't know what specifically they were doing.

• • • •

[168] CROSS-EXAMINATION

Q Okay, what, if anything, do you recall [169] hearing during this period of time, from the time that the door was knocked on, until you made entry through the door into the apartment?

A I didn't hear a thing that I can recall.

* * * *

[170] Q Did you or any of the Metro officers, to your knowledge, seize anything from the apartment other than making an arrest of the injured subject and those subjects that weren't injured?

A To my knowledge, we did not seize anything.

* * * *

[177] REDIRECT EXAMINATION

Q How long, generally, does it take to obtain a telephonic search warrant?

THE COURT: That would depend on a lot of things.

MR. OSERAN: If it is done in a normal working day?

THE WITNESS: Well, at what point do you want to start? At the point that we would begin collecting information?

MR. OSERAN: No, at the point you had the information and were attempting to secure the warrant?

THE WITNESS: Then it would depend on—

MR. OSERAN: Availability of a judge?

THE WITNESS: First, yes.

MR. OSERAN: Assuming that you could immediately contact a magistrate—

MR. HOWARD: I would object to the assumptions.

THE COURT: Sustained.

MR. HOWARD: And to the form of the [178] question.

BY MR. OSERAN:

Q Could it be done within a matter of minutes?

A No, sir, it is almost impossible to get a telephonic search warrant during a working day.

Q Because the magistrates are—

A On the bench.

Q What about during the evening hours or on weekends or holidays, is it easier then?

A Once we have gotten one tracked down, but that sometimes, finding the judge, physically locating him, is a problem.

* * * *

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA, COUNTY OF PIMA

EXCERPTS FROM HEARING ON
MOTIONS TO SUPPRESS--February 3 and 4, 1975

TESTIMONY OF MORRIS REYNA, JR.

* * * *

[105] MORRIS REYNA, JR.

called by Mr. Howard, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HOWARD:

Q State your full name and occupation, for the record, please.

A Morris Reyna, Jr., detective with the homicide detail, Tucson Police Department.

Q Calling your attention to the 28th day of October, 1974, did you become involved in an investigation of a homicide in the afternoon of that day?

A Yes, sir, I did.

Q And did you have occasion to go to The Colony apartments in the course of that investigation?

A Yes, sir.

Q What time was it when you arrived at [106] The Colony apartments?

A About 3:28, 3:30.

Q What was the occasion for your arrival there; what had you heard or what brought you to that location?

A Through radio traffic I had ascertained that a shooting had occurred and a police officer had been shot, as other people had, and in response to that situation, we went to investigate the shooting.

Q You say "we." Who else arrived there?

A Detective Larry Hust, Detective Victor Marmion, Sergeant Bunting, and other detectives.

Q Did you arrive with one of these other officers?

A I arrived simultaneously in a different vehicle. We were all driving separate vehicles.

Q What did you do when you arrived?

A I contacted Lieutenant Fuller and was briefed as to what had transpired. I relieved one of the Metro agents who was in the bedroom at that location watching over a subject, and essentially secured the scene and proceeded with the scene investigation.

Q When you say you relieved one of the agents, in what room in the apartment was this [107] agent?

A He was in the bedroom. There is only one bedroom in that apartment.

Q What was he engaged in doing at that time?

A He was engaged in watching over Mr. Mincey who was laying on the floor directly below or in front of him.

Q Then what did you do from that point forward?

A I tried to make sure that the subjects, three subjects I saw in the room that were shot were taken care of and removed, and after the subjects were removed and during the course of their removal I tried to ascertain to make sure that no evidence was destroyed and nothing other than what was absolutely necessary be touched or moved.

Q Did you have a conversation with Detective Sergeant Bunting shortly after your arrival at the apartment?

A Yes, sir.

Q And did he make, did he assign particular duties to you?

A Yes. He assigned the scene investigation to me.

[108] MR. HOWARD: Can I have this marked as State's Exhibit 1?

THE COURT: Yes.

Q Can you draw a diagram of the apartment on what has been marked as State's Exhibit 1, not necessarily to scale, but just showing the rooms and their relationships to one another.

A Yes.

Q Including the front door.
A This is an approximation of the general idea of the apartment, the Colony apartments. The living room, bedroom, closet, bathroom, kitchen and the front door.
Q You can have a seat now. There is another door here to the next-door apartment, is that correct, on this wall?
A Yes, sir.
Q Where you have indicated kitchen and bathroom, are these cupboards you have built in here?
A Yes.
Q This whole area is the kitchen?
A Yes.
Q And this area is the bathroom?
A Yes.

• • • •

[109] Q When you arrived at that apartment, or when you arrived at the Colony apartments, did you see Officer Barry Headricks?
A I observed him being loaded into the ambulance, which would be in the south parking lot of The Colony apartments.

• • • •

[110] Q After you had the conversation with Detective Sergeant Bunting, what did you do?
A I secured the scene and removed and [111] insured that everyone other than uniformed officers, I.D. techs and laboratory personnel were out of the scene, and proceeded to record photographically everything we could in the apartment.

• • • •

Q What procedure did you take once you cleared the apartment of the personnel other than the I.D. techs and lab personnel you needed present?
[112] A What did I do after that?
Q Yes.
A I insured the scene would be accurately measured and proceeded with the plotting of evidence, searching the room for anything of evidentiary nature, and in short,

tried to insure that everything possible could be done to make sure we had all the evidence, everything photographed, diagramed and accurately recorded.
Q Who aided you in the measuring procedure and seizing evidence from the apartment?
A Officer Lynch, Agent Lepird from the Sheriff's Office, Mr. Condron.
Q Who is Mr. Condron?
A Mr. Condron is a police illustrator, a man I utilize for crime scenes reproductions, and then the I.D. technician. We all worked together under my instructions.
Q At the time that this happened, had the injured persons, three injured persons, Mr. Mincey, Debra Johnson and Mr. Ferguson, were they removed from the apartment?
A Yes. As soon as we could, we removed them to get medical assistance.
Q And how about the two arrested subjects, Miss Greenwalt and Mr. Hodgeman?
[113] A Yes. They were removed as soon as feasible in order to remove them from the scene.
Q Had you started your crime scene investigation even before they left the scene?
A Yes, essentially.
Q How did you proceed with the aid of Officer Lynch and Deputy Lepird to search and investigate within the apartment?
A I attempted to make sure that everything had been photographed in this place and tagged and left marked where it was found in order to obtain the measurements accurately. We took it systematically, going in one room at a time going in a counter-clockwise or clockwise direction. [114] I had agent Lepird standing by to watch the whole proceedings to make sure I did not forget anything, and this is what he was utilized for, in assistance in measurements at different angles of photography.
Q Which room did you start in, do you recall?
A We started the photography in the living room and terminated in the bedroom. We started the crime scene search where we started actually picking items up and

bagging them, in the bedroom; however, I had essentially when searching the room upon my arrival.

Q Can you tell what type of things you looked for?

A I was looking for narcotics paraphenalia, since it had been allegedly been a result of a narcotics transaction.

Q Let me start at the beginning. What had you been told by Lieutenant Fuller about what had occurred in the apartment?

MR. OSERAN: I object on relevancy. As far as this Officer is concerned in what his state of mind is is really not important. His actions are relevant and material to what he is testifying to.

• • • •

[119] Q What narcotics generally, what narcotics, narcotics paraphenalia did you find during the course of your investigation?

A I found a syringe; some cocaine in a little bottle; some heroin, and a shirt in which I found some identification of Mr. Mincey; in a bottle in the bathroom something —, in a bottle on top of a plate, paraphenalia here; some surgical tubing in here, which from my experience has been used to tie off or cause veins to pop up for easier injection; and some heroin in a small foil package here; some other items I can't recall.

Q Did you seize those items either narcotics or narcotics parphenalia?

A Yes, I did.

Q Did you take also samples of various fabrics in the apartment which carried blood stains?

A Yes, sir, I did.

Q The shirt you mentioned with heroin in it, where was it?

A It was hanging on a chair right in that area in the bedroom.

Q And what else was in that jacket—[120] what kind of jacket was it?

A It was a military fatigue jacket. The sleeves had been cut off. In that jacket or shirt was identification be-

longing to Mr. Mincey, and in the same pocket was some heroin and money in a little plastic bag, and a small metal tube.

• • • •

[126] Q To your knowledge was anything seized at the scene, or was any search performed by Agents of the metropolitan area narcotics squad or Tucson Police Officers assigned to that squad?

A To my knowledge, there was no search or seizure by any of those agents.

• • • •

CROSS-EXAMINATION

[140] Q How did you first hear that Officer Headricks had expired at the University Medical Center; who contacted you?

A Sergeant Larry Bunting told me that Barry had died about—

Q Excuse me. How did he contact you?

A He spoke to me in person.

Q Was he at the apartment at that time while you were conducting your investigation, or did he come to the apartment?

A He came to the apartment.

Q To advise you that Officer Headricks had expired?

A I don't know if it was specifically for [141] that or to ascertain something during the investigation, which frequently you converse with other investigators to determine and correlate information.

Q At the point in time he came to the apartment to talk with you, who else was present in the apartment with you? Was Officer Lynch there?

A Officer Lynch, Bill Condron, I.D. Technicians and Agent Lepird.

Q How long did the entire crime scene investigation take; how many days did you spend in the apartment?

A Initially I worked on it that night until I was just exhausted, and then I returned the following day continuing with the investigation, I did work up until, the last time I was in the apartment, possibly a month ago.

Q Approximately three or four days initially?
A The initial investigation, yes.
Q Did you inventory all the items in the apartment in your investigation?
A Pardon?
Q Did you inventory every item contained in the apartment during your investigation?
[142] A Eventually the contents of the apartment were removed, inventoried, yes.
Q Did you ever secure a search warrant?
A I did not.
MR. OSERAN: I don't have any further questions.

REDIRECT EXAMINATION

BY MR. HOWARD:

Q On the 28th and into the early morning hours of the 29th, when did you terminate your investigation, the evening of the 28th or the morning of the 29th?
A I don't recall what time. I continued until I was very, very tired and didn't feel I could function properly.
Q Approximately when was that; was that the early morning hours of the 29th?
A Yes, the early morning hours of the 29th.
Q What did you do at that point?
A I proceeded down to the police station with Officer Lynch explaining to him how to handle the items we had taken under my direction, and made some notes concerning what I had done, which were later reduced to a report, and I went [143] home.
Q What did you do at the apartment when you left the early morning hours of the 29th?
A I had caused to have some uniformed officers there to secure the apartment, stayed in the apartment and keep it from being entered by anyone and to keep it in police custody so I could continue my investigation.
Q Somebody was there, you posted somebody there and they stayed there until you returned?
A There were officers there 24 hours until we terminated the investigation.

Q During the first segment of your investigation—strike that. What items were seized after that first segment of your investigation; what items were taken from the apartment after that first segment of your investigation?
MR. OSERAN: Are we talking about the first segment, the initial three or four times?
MR. HOWARD: We are talking up until he left the apartment in the early morning hours of the 29th, as the first segment.
A Okay, and the question was what?
Q What items were received after that?
A I received since I lacked adequate tools to do so, I had to make a hole in the concrete [144] wall to obtain bullet fragments. I had the crime lab personnel, which did not conduct tests for me initially, take items that were unavailable. The scene was essentially kept that way until I was able to reconstruct what had transpired.
Q During the first segment of the investigation were measurements taken?
A Yes sir.

* * * *

[147] RECROSS-EXAMINATION

BY MR. OSERAN:

Q How many hours did you spend in the apartment on the 28th?
[148] A On the 28th, until midnight.
Q Nine hours?
A From my arrival at 3:28 until midnight.
Q Did you virtually search and look into every room and every drawer and every cupboard in the apartment?
A That portion I accomplished before the 28th expired, yes.
Q What you couldn't accomplish you finished in the next four days?
A I finished running into the next morning until I was very, very tired and I didn't feel I was functioning at my best.

Q Did you take anything from the apartment on the 28th?

A Well, it was seized. It may not have been removed.

Q Did you remove anything from the apartment on the 28th?

MR. HOWARD: Are we talking about the 28th?

MR. OSERAN: And the early morning hours of the 29th?

A I was restricting myself from previous contact with attorneys. The 28th and 29th, items were removed from the apartment, yes, to be used [149] in the investigation as possible evidence of the crime and the transaction that was to transpire.

Q When?

A Sometime in the early morning hours of the 29th, the following day, the 29th.

Q You mean the following day or do you mean 12:00 to 1:00 in the morning?

A Some items were removed that night and some other items were removed the following day.

• • • •

[150] THE COURT: When did you find and remove the narcotics?

A The narcotics were found during the 28th and the 29th initial investigation. They were removed on our leaving on the 29th when I followed Officer Lynch to the station and instructed him how I wished the items placed in property.

REDIRECT EXAMINATION

BY MR. HOWARD:

Q Would those items appear on property control sheets as being received as property from Officer Lynch, number 8677, on the early morning hours of the 29th of October, be the items you are referring to as removed from the apartment either the late night of the 28th or the early morning hours of the 29th?

A Yes.

MR. HOWARD: No further questions.

RECROSS-EXAMINATION

BY MR. OSERAN:

Q You were advised by Officer Fuller that all the shooting took place in the bedroom, were you not?

[151] A Yes. I was advised the shooting emanated in the bedroom and come out through the walls.

Q The bullets came out through the walls but all the shooting in fact took place in the bedroom is that correct?

A Yes, the shooting itself.

Q And at the time you first arrived and observed Mr. Mincey, can you describe what position he was in?

A He was laying on his back with his hands along the side occasionally looking at me and closing his eyes.

Q Was he unconscious for some period of time?

A He was intermittently unconscious and would regain consciousness.

Q Had he sustained a gunshot wound?

A He had.

MR. OSERAN: No further questions.

MR. HOWARD: Nothing further. May this witness be excused?

THE COURT: Yes. You may step down and you may be excused.

• • • •

TESTIMONY OF DETECTIVE HUST

DIRECT EXAMINATION

• • • •

[153] Q And then where did you go?

A To the Arizona Medical Center.

Q And who else, what other officer—strike that. Was Officer Schwarz also at the Arizona Medical Center?

A He was there when I arrived, yes.

Q Were you given an office which you could use as a command post or just a point you could be reached while at the Arizona Medical Center?

A Yes.

Q Did the office have a telephone?
A A telephone, yes.
Q Was Detective Schwarz in the office?
A Yes.
Q And were you advised that Officer Headricks was in the emergency room at that time?
A Yes.
Q And were you shortly thereafter advised that other wounded individuals, perhaps suspects in this matter, were also arriving at the hospital?
A Yes.
Q Did you ask Detective Schwarz to get some uniformed personnel to help guard the suspects [154] that were arriving?
A Yes.
Q And a short time thereafter were you advised that Officer Headricks had expired in the emergency room?
A Yes.
Q Who advised you of that?
A The coordinator of the emergency room.
Q What did you do when you heard that?
A I advised Detective Schwarz to notify the station. I also notified Sergeant Bunting by radio.
Q Was Sergeant Bunting aware of the information prior to your notification?
A I don't know if he was or not.
Q You don't recall, or do you—how long after you learned that Officer Headricks expired did you contact Sergeant Bunting?
A I believe I got hold of him within a few minutes.
Q To the best of your knowledge this was the initial point in time he learned Officer Headricks had expired is that correct?
A To the best of my knowledge, yes.
Q Were you then contacted by Office personnel to do something in regard to the suspects?
[155] A What office personnel?
Q Nurses.
A The nurse, yes. I was requested to remove handcuffs from the individuals that were brought in.

Q Did you remove handcuffs from the man who you now know to be Rufus Mincey sitting to my right?
A I believe I did, yes.
Q You don't specifically recall if you did or not?
A Not specifically.
Q Do you recall when it was the first time that you,—The exact language when you raised Sergeant Bunting on the air and advised him that Officer Headricks had expired, was the language used that "We have a homicide"?
A Yes.
Q What did he say when you told him you had a homicide?
A Probably "ten four."
Q That is all you recall?
A Right.
Q When is the first time you recall seeing or coming in contact with Mr. Mincey?
A I recall seeing him in the emergency [156] room. I believe he was in the hall being cared for by doctors and nurses.
Q This is prior to the time you removed his handcuffs?
A No. I believe it would have been afterwards.
Q Do you recall on what he was laying, a stretcher or bed, wheelbed?
A On a wheelbed-type emergency.
Q In what position was he lying?
A On his back, I believe.
Q Did you see his face, or do you recall?
A I don't recall if I could or not.
Q Was he being fed intravenously at that time?
A I don't recall if he was or not at that time.
Q Were doctors and nurses working on him?
A There were doctors and nurses all over the emergency room and around all the patients.
Q Did you have the opportunity to come in contact with Mr. Mincey after he was taken from the emergency room?
A Yes. Later that evening I did.
[157] Q How much later was that?
A Probably three or four hours later.

Q Do you believe it was three to four hours later?
A Yes.
Q And in what unit of the hospital did you have contact with Mr. Mincey?
A The intensive care unit.
Q When you entered the intensive care unit, who was present in that area in which Mr. Mincey was?
A There were several nurses and doctors in the area.
Q And do you recall specifically who was present at the bedside of Mr. Mincey?
A On that day?
Q At that time.
A I believe his assigned nurse was Elizabeth Graham.
Q Can you describe where Mr. Mincey was and what he was doing and what was being done to him in the intensive care unit?
A He was in one of the intensive care rooms being fed intravenously. He had a tube down his throat.
Q When you say "had intravenously" do [158] you mean there were bottles suspended and needles going into his arms?
A Yes, that's right.
Q Were there any tubes in any other parts of his body?
A I believe he had a tube in his throat, down his throat.
Q Do you know what the purpose of that tube was?
A I could only guess. I don't know for sure.
Q Did you later learn it was to enable him to breath?
A That was my understanding, yes.
Q And when you entered the room were his eyes open or closed?
A I don't recall if they were open or closed.
Q Was your reason for entering the room to interrogate Mr. Mincey if possible?
A To interview him, yes.
Q And did you in fact interview Mr. Mincey?
A Yes.
Q And did you ask him questions?
A Yes.

[159] Q Did you record the questions you asked him?
A No.
Q Did you take notes in regard to the questions that you asked him?
A Not right at that point, no.
Q What time did you first record the questions?
A I believe later that evening I jotted some information down, and the following day.
Q Do you recall what time on that evening?
A No, not the exact time.
Q And do you have copies of those notes that you took?
A Yes.
Q Do you have those copies with you?
A All the notes that I took?
Q Yes.
A I don't know if I do or not. They may be in the case file.
Q Are copies of those notes still available?
A I don't know if they are in there or not.
MR. OSERAN: If they are available, Your Honor, I would ask they be provided to the [160] Court pursuant to my motion for disclosure. I originally asked for that material and the Court ordered it would be provided to me regardless of the circumstances.
THE COURT: Very well. If they are available, I will ask you to furnish them for him.
Q (By Mr. Oseran) And did you ask Mr. Mincey questions verbally?
A Yes.
Q Did he respond verbally?
A No.
Q Why did he not respond verbally?
A He had a tube in his throat and he couldn't talk.
Q How did he respond?
A He wrote notes back.
Q In preparing and taking notes in regard to the questions you asked, did you have the answers available to you that had been written out by Mr. Mincey?
A Yes.

Q And with those answers you attempted to reconstruct what his questions had been is that correct?

A Yes.

Q In your police report when you show [161] questions and answers, questions and answers, these answers are, in fact, accurate, that the questions were written down by you at a later time to the best of your memory as to what your original questions had been; is that correct?

A As accurate as I could, yes.

Q Do you have the copies, the original copies of the statements whether unculpatory or exculpatory written by Mr. Mincey?

A Yes.

Q Do you have those on you?

(The witness hands paper to counsel.)

Q What kind of paper are the statements written on?

A That was paper supplied by the hospital.

Q Are some of the statements in handwriting and some statements in printing?

A Yes, I believe they are.

Q But they are all the statements of Mr. Mincey?

A Yes.

Q When you first approached Mr. Mincey, isn't it true that you awoke him, or somebody else awoke him from sleep?

A I don't recall that, if I woke him or [162] somebody else woke him or he was awake when I walked in.

Q Isn't it also true that you originally did not advise Mr. Mincey of your true purpose for being present at that time?

A You mean when I immediately started talking to him?

Q Yes.

A No.

Q And the first question you asked him dealt with one of the other subjects that had been wounded; is that correct?

A Yes.

Q And some of the information you were eliciting from Mr. Mincey at that time was already information known to you, was it not, in regard to Chuck being from the fair, these sort of things?

A No. I did not have any knowledge of that when I questioned him.

Q Did you go to his room specifically to interview him and his involvement in regard to the shooting?

A Along with attempting to obtain information about Mr. Ferguson, yes.

Q At what point did you advise him of his [163] constitutional rights?

A When I stopped questioning him about Mr. Ferguson, as far as his name and where he lives and everything, and it turned into an interview type situation.

Q I am going to read to you the answers of Mr. Mincey. Will you try to describe to the best of your knowledge at this time the question that you asked him in order to elicit these responses:

"I remember somebody standing over me saying, 'move nigger, move.' I was on the floor beside the bed."

A I probably asked him to the effect, "what happened?"

Q And your second question, this would be the answer to your second question:

"This is all I can say without a lawyer."

THE COURT: Excuse me one moment.

Q And the second response from Mr. Mincey was, "this is all I can say without a lawyer." Do you recall what the question was?

A Not right off hand, no.

Q And the third response by Mr. Mincey was: "I am going to have to put my head together. [164] There are so many things that I don't remember."

Do you recall what the question was?

A Probably something in regard to the shooting.

Q And the next response, there are three responses in a row, "police? Do you mean did he give me some money? No. What do you call a sample. I can't say without a lawyer."

Do you recall what your questions were?

A I believe there was something, "Who came into your apartment?" Read the last two again.

Q "Do you mean, did he give me some money. No. What do you call a sample?"

A That would be some type of question to the effect of "Did you sell any narcotics and did you give out any type of sample or did anyone sample anything."

Q And he advised you he couldn't say without a lawyer. You remember the next response, "Let me get myself together first. You see, I am not for sure. Everything happened so fast I can't answer at this time because I don't think so, but I can't say for sure. Some questions aren't clear to me at the present time." Then you recall immediately under that, "This [165] writing was used as a means of talking because I could not talk at the time of the interview."

A Yes. I probably asked him to sign that to show that it was voluntarily given.

Q And do you recall the next answer after that, "if it is possible to get a lawyer now we can finish the talk. He could direct me in the right direction whereas without a lawyer I might say something thinking it means something else. Is is still inside me? My right leg. I can't use it. I can't even move it. The pain is unbearable. I will helf you if I can and everybody possible. My name is Sergeant," and struck, "Rufus J. Mincey," and his address. Do you recall what your question was in regard to that answer?

A Not right off hand, no.

Q Did you ever stop questioning Mr. Mincey when he asked for an attorney?

A I believe I advised him if he wanted an attorney I could no longer talk to him. Also that he had the right to refuse to answer any question he wished to.

Q Did he ever report his responses to that question anywhere in his statement, that he wished to began talking to you?

[166] A No, I don't believe so. I believe it was with an affirmative nod of the head.

Q My question was: Did you ever stop talking to Mr. Mincey after your second question when he responded, "this is all I can say without a lawyer."

A Did I ever stop talking?

Q Did your questioning cease at that time?

A Apparently not. There are some more answers there.

Q Are these five pages all the pages and all the responses that were elicited from the defendant Mr. Mincey?

A That I took, yes.

Q Did anybody else take any statements from Mr. Mincey inculpatory or exculpatory at that time or any other time?

A Not to my knowledge.

Q During the course of time you were in the room other than hearing Mr. Mincey's response that he was in unbearable pain, did you learn that he was uncomfortable at that time in any other way? In other words, let me phrase it this way: do you recall Mr. Mincey advising the nurse that he was very cold, by writing or by his motion, and to put covers over his body?

[167] A I believe something was done and he had his feet covered. I don't recall what response he made.

Q Is it true that altogether in the five pages of written statements, that he advised you seven time that he wanted an attorney?

A I don't know how many times he advised me.

Q Is it true that he repeatedly advised you he was confused at the present time at to the facts of the incident?

A Yes. He did advise me of that.

Q And it is true also, is it not, that he did complain of pain, unbearable pain, on at least two occassions, would you say?

A I recall one occasion. It is possible he did on two.

MR. OSERAN: No further questions.

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CROSS EXAMINATION

[169] Q When you completed asking those questions about Chuck Ferguson, what did you do?

A I advised him of his constitutional rights; also the fact that he was under arrest for the murder of a police officer.

Q When you advised him of his rights, how did you do that?

A By the little Miranda card.

Q Do you have that card with you today?

A Yes.

Q Will you read it now as you read it then for Mr. Mincey.

A You have the right to remain silent. Anything you say can and will be used against you in a Court of law. You have the right to the presence of an attorney to assist you prior to questioning if you so desire. If you cannot afford an attorney, you have the right to have an attorney appointed for you prior to questioning. Do you understand these rights—his response was an affirmative head shake—now having been advised of these rights and understanding these [170] rights, will you answer my questions?—Again being another affirmative head shake.

Q Did you proceed to question him concerning the events of the afternoon of the 28th, October, 1974?

A Yes.

Q And he responded by writing answers in most cases, is that true, on hospital forms or hospital paper provided?

A Yes.

Q Had you received permission prior to talking to him, from hospital personnel?

A Yes.

Q From whom?

A I believe I talked with Dr. Farrel, and again the nurses checked with somebody to get it authorized.

Q Did Mr. Mincey appear to be under the influence of any drugs at the time you talked to him?

A Not that I could detect.

Q Did he appear to understand your questions as you questioned him?

A Yes.

Q Did he make responses for the most part that seemed appropriate to those questions?

[171] A Yes.

Q When was it you recorded in a police report the sequence of those answers and questions that went with those answers; do you recall?

A I don't recall the exact date.

Q Was it within a few days of the time you questioned him?

A I believe it was.

Q Would your memory then be better than it is now as to the exact questions you asked?

A Yes.

Q Can you tell the Court the exact questions without reference to that report to refresh you memory, the exact questions you asked which elicited the responses that were written by Mr. Mincey?

A Without reference to the report?

Q Yes.

A No. I couldn't go through that and quote them all.

Q I show you what is marked as State's Exhibit two and ask you if this is the report that you referred to and which you wrote the questions and repeated the answers?

A Yes. That is the report.

[172] Q When did you prepare that report?

A November 4, 1974.

Q With reference to that report, can you tell me what questions you asked, or as your memory is refreshed by that report, what questions you asked when the defendant Mr. Mincey wrote, "I remember somebody standing over me saying 'move nigger, move,' as I was on the floor beside the bed."?

A Yes. That would have been the question, "I then proceeded to advise him of his constitutional rights. I also advised him he was under arrest and charged with killing a police officer," I went on to question him, "What do you remember that happened?"

Q Do you remember what you said then to elicit the response which is, "this is all I can say without a lawyer"?

A The question by myself, "Do you remember shooting anyone or firing a gun?"

Q And do you remember what you then said which elicited the response, "I am going to have to put my head together. There are so many things that I don't remember like, 'how did they get into the apartment?' "

A There was a question in between there [173] with a head shaking in an affirmative manner which would have led to that response.

Q What was that question?

A That would have been, "If you want a lawyer now, I cannot talk to you any longer; however, you don't have to answer any questions if you don't want to. Do you still want to talk to me?" At that time Mr. Mincey gave an affirmative head shake and then I went on and asked, "What else can you remember?" which would be in response to the question you just asked me, "I am going to have to put my head together. There are so many things I don't remember like 'how did they get into the apartment' ".

Q What question elicited the next response of, "police"?

MR. OSERAN: Your Honor, I am not sure this is valid cross-examination. He is reading a report made into the record in which he made six days or seven days after the incident in question. I think he ought to be asked if he can recall what his questions were, if he is rehabilitating him and if he is not doing it in a proper manner.

THE COURT: He did that and he said he couldn't. [174] MR. OSERAN: I think he should ask him for each question before using the police report, otherwise put the police report in evidence.

THE COURT: I was going to suggest that. I thought you would object to that.

MR. OSERAN: I will object to that.

Q (By Mr. Howard) Without reference to your police report to refresh your memory, can you remember the exact question which led to the response, "police"?

A Not exactly.

Q Will you refresh your memory, please.

A It would be, "how did who get into the apartment?"

Q And his answer was, "police"?

A Right.

MR. HOWARD: Your Honor, we could go through everyone of these this way. Perhaps counsel and I could enter into a stipulation that the police report, which has been marked, would be his response, instead of going through it that way, and submit to the Court the police report which has the written questions along with the defense exhibit which the Court has, for the Court's determination.

[175] THE COURT: This has the questions written on it in his handwriting.

MR. OSERAN: But these were written on at a much later time.

THE COURT: I know but I would assume that these are the same as in the police report.

MR. OSERAN: I would rather have it that way.

THE COURT: To utilize this rather than put in the whole police report?

MR. OSERAN: Yes, because there is one problem with regard to the police report and that is that some of the questions in trying to reconstruct, I am sure Officer Hust made at least one mistake in the order of the questions and answers.

THE COURT: You have seen this?

MR. OSERAN: I have seen it.

THE COURT: Is that agreeable?

MR. OSERAN: The five pages that were marked?

THE COURT: I am confused because they weren't in the right order. There are the first six and then there are two separates. Did you have two different interviews?

THE WITNESS: I believe there were three [176] different interviews and I kept them in order as I went along and separated the information. That is when I wrote this to keep it straight.

THE COURT: Let us separate the different interviews, or is it all written continuously?

THE WITNESS: I believe some are continued right on. This would be the first page upon my entering intensive care. This was given to me by the nurse.

THE COURT: Put that on top of it and I will staple them in order.

THE WITNESS: I may have to go through them and correspond them with this. I had them in order at one time.

MR. OSERAN: You have numbers here: one, two, three, four, six. Here is five here, six, these would be seven and eight or eight and seven; is that correct?

A I believe so.

Q (By Mr. Howard) Will you look at those. Do they go as seven and eight? The record should show that he is marking seven and eight on them.

MR. OSERAN: Here is the problem with this. I believe these were marked by Officer Hust. [177] I don't believe they are in the proper order. Here is the first page. The page he has indicated as page one, the bottom line is, "this writing was used as a means of—", and "I can't say without a lawyer," is not consistent with page four where it says, "nobody knows John," but it is consistent with page six, "this writing was used as a means of talking because I could not talk at the time of the interview." Though the officer believes these are—

THE COURT: I took them out and put them in the order of one, two, three, four, five.

MR. OSERAN: What I am saying is that it is my understanding this would be the proper order.

THE COURT: I will take a short recess. Maybe you can get all these together and agree on some stipulation so we don't have to waste time.

RECESS

AFTER THE RECESS

LARRY HUST

previously called and sworn, resumed the stand and testified further as follows:

[178] CONTINUED CROSS EXAMINATION

BY MR. HOWARD:

Q Let me ask you at the outset, is defendant's Exhibit D now in order of the responses given to your questions as much as you can do so given the structure of defendant's Exhibit D?

A Yes.

MR. HOWARD: With the Court's permission, I will staple these together.

THE COURT: Very well. Do you have any objection to this being admitted for the purposes of what we have been trying to ascertain for the purposes of this hearing only?

MR. OSERAN: The statement itself.

THE COURT: Defendant's Exhibit D.

MR. OSERAN: Fine.

MR. HOWARD: I have no objection.

MR. OSERAN: With the understanding that I am not necessarily in agreement with the order that is being submitted, but I think the Court as well as I or anybody else can make that determination of what order the statements were elicited, by following the pattern as provided in the statements.

THE COURT: Very well.

[179] Q With regard to defense Exhibit D, there are some blue pen writings in small very small, generally longhand on each of these pages, or most of these pages. Is that your handwriting?

A Yes.

Q What are those notes; some are out in the margin and some are written above responses that you have identified as being the defendant's?

A They would have been the questions I asked the defendant which I made notes on that page.

Q Are those the complete questions that you asked or are those notes you made for yourself?

A Just notes for myself.

Q When did you make those notes?

A I believe the following morning.

Q When then did you sit down and write out complete questions and associate them with the responses as they were given in writing and by head movements of the defendant?

A I believe it would have been some time either later that day or the immediate following day.

Q That is the report that I had marked as State's Exhibit No. Two, is that correct?

A Yes.

[180] Q After advising the defendant of his rights, do you remember, without reference to your report, the third question you asked him?

A No.

Q Can you refresh your memory as to that question and his response?

A The third question?

Q Yes.

A "If you want a lawyer now I cannot talk to you any longer; however, you don't have to answer any questions you don't want to. Do you still want to talk to me?"

THE COURT: I thought we were avoiding this by putting this in?

MR. HOWARD: We are not, Your Honor, because the questions that are written in in pen and ink are not complete, but just notes that the officer made himself and are not the complete questions.

THE COURT: Do you have to go through every question?

MR. HOWARD: I have tried to make a stipulation with defense counsel that we could just for the purpose of this hearing use the officer's written supplement, or that portion of the supplement which deals with the questions and [181] answers because that is ultimately what we are going to end up with when refreshing his memory on each question and answer. However, counsel is unwilling to do that.

MR. OSERAN: I will tell you why. He is asking for him to refresh his memory and reading the questions that may or may not be the questions he asked the defendant.

THE COURT: This is to the best of his ability and I think he has a right to do that. I thought I was avoiding this by the other. I didn't realize this jotting. I will allow him to do it. If you want to avoid that just put in that portion, I don't care. Either way.

MR. OSERAN: Which portion.

THE COURT: Of this report which goes to that, what the question was.

MR. OSERAN: I believe, number one: that the report is inaccurate, and I believe also that the questions may or may not have been the questions asked. I think the date of the report is the fifth or six, which is eight days after the incident.

MR. HOWARD: Counsel wouldn't have to stipulate as to the accuracy or the truthfulness [182] of the responses.

THE COURT: Just what he testified to after you asked the questions. I wouldn't assume he would stipulate to the other. I was trying to avoid going through all this.

MR. OSERAN: For the purposes of what any aid it may give the Court, I concede to the Court that it would be useful to the Court, but I feel obligated to show an objection to it because I don't think it is accurate.

THE COURT: Will you stipulate to this: That the Court has indicated it would allow counsel for the State to ask the questions by the means of refreshing his memory from the report, over your objection, to indicate what the questions were he asked to each response, and that to avoid going through each one of those individual as we are doing, we would stipulate that if the question was asked, the answer would be as shown on the report, but in no way stipulate that is correct, or anything of that nature.

MR. OSERAN: If the question was asked—

MR. HOWARD: —and the officer were allowed to refresh his memory.

MR. OSERAN: —he would read the question as shown on the report.

[183] THE COURT: Yes.

MR. OSERAN: And that he has been reading the questions on the report.

THE COURT: Any way that you want to do it.

MR. OSERAN: I object to him reading it in the first place.

THE COURT: Yes. The record may show that stipulation.

MR. HOWARD: So stipulated. It is clear where the questions and the answers start in State's D. We could cut the rest of the report out but since it has been marked in evidence, we can stipulate the questions and answers portion is what we are submitting for this purpose.

THE COURT: Maybe I can extract them later and have it marked in with that stipulation. Is that agreeable with all the modifications we have put in?

MR. OSERAN: Fine.

THE COURT: Is that agreeable that I will extract from this exhibit just those parts that we are referring to and have that marked in evidence with the stipulation and the other portion of the report will not be in?

[184] MR. OSERAN: That is agreeable with me.

THE COURT: Fine.

MR. HOWARD: I have a couple of other questions.

Q (By Mr. Howard) During the course of these questions and answers did Mr. Mincey lose consciousness at any time?

A No.

Q Did he other than the mention of a lawyer on several occasions, did he tell you he didn't want to talk to you?

A No.

Q Did he at any time, in fact, request that you return and talk to him again?

A Yes.

Q Did you do anything to force or duress or use duress in any way with regard to Mr. Mincey?

A No.

Q Did you lay your hands on Mr. Mincey at all?

A No.

Q Did you use any form of mental coercion?

MR. OSERAN: I object, what the Officer believes mental coercion is.

THE COURT: Overruled.

[185] A No.

Q Did you threaten him in any way?

A No.

Q Did you make any promises to him?

A No.

Q During the course of your interview with Mr. Mincey at the hospital was there anyone else present besides the nurse you referred to, Elizabeth Graham?

A Yes. There was a Mr. Frank Sharp, who is the service coordinator for that floor, was present during some of the interview.

Q Did either Mrs. Graham or Mr. Sharp take any part in questioning while you were questioning Mr. Mincey in any way?

A No.

Q Did either of them threaten Mr. Mincey in any way?

A Not in my presence.

Q Did either of them make any promises to Mr. Mincey?

A Not to my knowledge.

MR. HOWARD: No further questions at this time, Your Honor.

[186] REDIRECT EXAMINATION

BY MR. OSERAN:

Q Larry, how come you went in three times?

A Various times the nurse or the doctor would have to go in to do certain medical things. At that time I would leave, or if it looked like he was getting a little bit exhausted I would leave for a while.

Q During the course of these interviews, how long did the entire three interviews take, from what period of time to what period of time?

A It wasn't very long; probably not more than an hour total for everything.

Q During that hour, he was receiving, during the course of that hour, on some occasions he was receiving medical aid from the doctors and nurses?

A Yes.

Q And during that hour sometimes he appeared to be exhausted; is that correct?

A Not exhausted but he was getting—you know,—

Q The point of being exhausted?

A Yes.

Q You use the word "exhausted." I am not [187] trying to put words in your mouth.

A I didn't want to get him to the point of being exhausted.

Q But he was tiring easily?

A Slowing down a little bit.

Q He was in a serious or critical condition at that time, or do you know?

A I don't really know the exact term they had at that time.

Q Prior to questioning him, you told him what had happened in effect, did you not?

A What do you mean?

Q You told him he is accused of shooting a police officer?

A Yes.

Q Did you also tell him he—he didn't know who the police officer was; isn't that correct?

A By name or?

Q Who the police officer was. Didn't he ask you in the course of the statements who the police officer was?

A Right.

• • • •

[190] Q Did you talk to Elizabeth Graham, the nurse, why all these people were wounded?

A She wasn't in the emergency room.

Q Excuse me?

A She was not in the emergency room.

Q Did you talk to her about it?

A I believe I mentioned it later, yes.

Q You mean after the time you took the statements from Mr. Mincey?

A No. I believe it was before.

Q You told other people about what had happened, did you not?

A I don't recall who I all talked to.

Q Do you recall Mr. Mincey telling you in a statement, "If I don't tell anybody, I don't have to make things up to make the lies look like the truth. Let John talk. All he can do is tell the truth or get caught telling lies, the same thing. I want a good lawyer. I am charged with murder. That is bad whether you did it or not. You don't have to prove you did something. You have to prove you didn't." Do you [191] recall him giving you that?

A Yes.

Q Do you recall what question you asked in regard to eliciting that?

A The exact question, no. I don't recall.

Q You put notes on there to help you remember what your questions were on the statements that were written by the defendant; is that correct?

A Yes.

Q And you believe you did that the following morning; is that your testimony?

A I am quite sure I did it the following morning.

Q Now you are sure you did it the following morning?

A Yes.

Q You may have taken other notes?

A Later that day or the following morning I am sure I did. I wrote it out in longhand.

Q The defendant did ask you to return or advise you you could return and talk to him after he had a lawyer and after he could get his head clear and get the facts clear; did he not?

A Yes.

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TESTIMONY OF ELIZABETH GRAHAM

[193] DIRECT EXAMINATION

BY MR. HOWARD:

Q Will you state your full name and occupation for the record, please?

A Elizabeth Graham. I am a registered nurse.

Q Where are you employed?
A The University Hospital, intensive care.
Q Calling your attention to the later part of October, 1974, did you have a patient in intensive care unit by the name of Rufus Mincey?
A Yes sir.
Q Did you have occasion to be present on the day Mr. Mincey was admitted to the intensive care unit?
A Yes sir.
Q Did you at that time meet a gentleman who later became known to you as Detective Hust from the Tucson Police Department?
A Yes sir.
Q About what time do you recall during the course of the day that Mr. Mincey was admitted and Detective Hust was present at the intensive care unit?
[194] A I cannot give you the exact time.
Q Was it during the course of the morning or afternoon?
A It was in the evening because I worked the evening shift so it was sometime after six, but I don't know what time.
Q Did Detective Hust have some conversations with Mr. Mincey, that is, did he ask him some questions and get some written answers from Mr. Mincey?
A Yes sir.
Q Prior to Detective Hust arriving and asking those questions of Mr. Mincey, did you receive any kind of written communication from Mr. Mincey?
A I don't remember because he couldn't talk, and there was a lot of admitting procedures. I don't remember about anything or not.
Q Let me show you Defendant's Exhibit D, the first page, and ask you if you recognize that at all?
A Yes sir.
Q As to the writing at the top of the page, did you recognize that?
A Yes sir.
Q Where did you see that before?
[195] A It was in Rufus' room on the clipboard.

Q During the time that Detective Hust spoke with Mr. Mincey, did he have permission of yourself and other members, doctors and members of the hospital staff, to speak with Mr. Mincey?
A Yes.
Q Did you stay present with him while he asked him questions?
A Yes.
Q Was Mr. Mincey under the influence of any kind of drug at that time?
A I did not give him anything, no. I don't know if—I don't think he got anything in the emergency room because of other problems involved. I don't think he got anything.
MR. OSERAN: I object to the answer and ask it be stricken because she doesn't know.
THE COURT: Sustained.
Q That is not your fault. How did Mr. Mincey, how was he injured when he was there on the 28th; what was the nature of his injury?
A He had a gunshot wound.
Q Where was the gunshot wound?
A His bottom but I am not sure, I think at the time there was some question if it was the sciatic nerve, but I didn't know at that time [196] if it was the sciatic nerve or not.
Q Were there any head injuries?
A No.
Q Did Mr. Mincey appear to be alert and understand what questions Detective Hust asked him?
A Yes.
Q Did Detective Hust or anyone else that was present do anything to force Mr. Mincey to answer questions?
A No.
Q Did anybody physically abuse Mr. Mincey during the course of the questions by Detective Hust?
A No sir.
Q Did anyone mentally abuse Mr. Mincey, that is, threaten him or call him names during the course of this procedure?
A No.
MR. HOWARD: No further questions, Your Honor.

CROSS-EXAMINATION

BY MR. OSERAN:

• • • •

[197] Q You did see him write this?
A Yes. I watched him write everything but I can't say what he wrote.
Q You saw him write this, "he knocked at my door. I thought he was cool. He had a .38"?
A Yes sir.
THE COURT: When was that written, before the officer came in or after the officer came in?
A (By the witness) It had to be after because I didn't ask him anything about what went on.
THE COURT: Very well. I was confused on that, where this started.
Q (By Mr. Oseran) What is the intensive care unit?
[198] A What is it?
Q Yes.
A Surgery and intensive care for critical patients.
Q Rufus was in critical condition at the time he was in that room, I would imagine?
A He wasn't critical, no.
Q Your opinion?
A Serious.
Q Serious and critical?
A He wasn't critical because his vital signs were stable and he was awake.
Q He was breathing okay?
A Yes. He had an intertrach tube, but his respirations were normal.
Q What is that?
A I think it was in his mouth. It is the tube that either goes in his mouth or nose, and goes to the trachia to aid him in respiration in case he had trouble. It was a precautionary measure.
Q Was it working?
A Sure it was working, yes sir.

Q What was it doing?
A It was connected.

• • • •

[199] Q Was there also a mask on his face?
A No. There was a t-tube, t-bar.

• • • •

[201] Q Would a more critical patient have a mask or have a tube in the trachia?
A Have the tube.
Q So, if he just needed some aid in breathing, then he would have a mask; is that correct?
A Right.
Q Now, you admitted Officer Hust into Rufus' room to allow him to talk with Rufus, did you not?
A Yes.
Q And who advised you to allow that?
A Nobody.

• • • •

[202] Q Did anybody give you permission to allow me to see Debbie Johnson?
A No. That is an individual thing.
Q What is an individual thing, to let somebody see a patient or not?
A Yes. It is up to the nurse.
Q Officer Hust, you know who Officer Hust is?
A Yes.
Q He wrote you some notes during the course of his interview with Mr. Mincey; is that correct?
A Detective Hust, no.
Q Wrote you some notes?
A Wrote me notes?
Q He didn't write you notes?
A No.
Q He talked to you, though, didn't he?
A Yes.
Q He asked you to encourage Rufus to talk to him, didn't he?
A No.
[203] Q When you came in and advised Rufus during a break in one of the interviews to cooperate and be as helpful as he could be, didn't you?

A I did tell Rufus that it might help, but nobody told me to do that.
Q But you did it on your own?
A Yes.
Q And Rufus was cooperative with Officer Hust, wasn't he?
A Rufus was great.
Q He was in pain?
A A moderate amount, yes sir. He was cooperative with everybody.
Q He was cooperative with everybody; he was trying to help everybody the best he could?
A Yes.
Q Was he a good patient, Rufus?
A Super.
Q Did you see Rufus when he first came out, up from surgery?
A I don't remember him coming from surgery. I think he came from E.R., but I admitted him and it would be in the nurse's notes where I admitted him from.
[204] Q Was he awake or asleep?
A Awake.
Q Was he asleep at a later time?
A Not as long as I took care of him that evening.
Q You don't recall him being asleep at the time Officer Hust came in?
A He didn't have time to sleep because there were so many admitting things to pester him with?
Q You weren't talking to him?
A Only telling him what I was doing.
Q Can you describe what other tubes he had in his body?
A He had a foley, I remember that, a foley catheter, a tube in his bladder. He had the intertrach tube.
Q He had a tube in his bladder; how was that inserted into him, into his penis?
A Yes sir.
Q And the intertrach tube goes down his throat?
A Yes sir.
Q And what else?
A And I believe he had a nasal gastric tube.

[205] Q What is a nasal gastric tube?
A A tube in his nose and down to his stomach.
Q What does that do?
A It is to keep him from vomiting. A lot of things in him.
Q Did he have any other needles?
A Yes. He had an I.V., intravenous, I don't remember where or what kind but he did have an I.V.
Q Do you remember any more than one needle in his body?
A No, I don't.
Q Was he lying on a bed?
A Yes.
Q Was he laying on his back?
A Yes.
Q How long had he come from surgery, do you know?
A I don't know that he went to surgery, but how long?
Q Yes.
A Before what?
Q Before Officer Hust came to talk to him?
A I couldn't say. I don't know.
[206] Q You described at least one needle in his arm?
A Yes.
Q A tube in his penis?
A Yes.
Q A tube down his throat and possibly down his nostrils and into his stomach, and laying in bed and being fed intravenously, and this is the condition in which he was interviewed by Officer Hust?
A Yes sir.
MR. OSERAN: Thank you.
MR. HOWARD: No further questions.
THE COURT: You may step down. You may be excused if you wish.
MR. OSERAN: Thank you.
THE COURT: Is that all of your testimony?
MR. HOWARD: I have nothing further.
THE COURT: Does the defense have anything further?

MR. OSERAN: I could call Stuart Patterson but I will avow that his testimony would be the same as that of Deborah Anderson.

THE COURT: It is up to you whether you call them or not. I cannot accept that as an avowal.

* * * *

[208] THE COURT: All right. The estimated time is two hours.

As far as the voluntariness portion of it, it is my understanding that the State has no intention of using any statements made by the defendant, in their case in chief. The only thing that the Court has to determine in this matter is whether they should be used in the event Mr. Mincey takes the stand for impeachment purposes.

* * * *

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

No. A-26666

[Title Omitted in Printing]

RESPONSE TO STATE'S OPPOSITION TO
DEFENDANT'S MOTION TO SUPPRESS
SEARCH AND SEIZURE

COMES NOW the Defendant, RUFUS JUNIOR MINCEY, by and through his attorney, RICHARD OSERAN, and submits the following as his response to State's opposition to Defendant's motion to suppress search and seizure.

If the arrest of the Defendant was lawful, then the metro officers could seize only those objects which were on the arrestee's person in the immediate area of the arrestee's control in which the arrestee might reach to grab a weapon or other evidenciary item. The State relies upon several cases to justify their search of the Defendant's apartment without a warrant as being "in the course of arresting . . . and of securing medical assistance", but the cases that the State cites for authority are inapplicable to this proposition. *U.S.* v. *Briddle*, 436 F.2d 4 (8th Cir. 1970) is a case wherein the Defendant was convicted of possessing a sawed-off shotgun. In *Briddle*, the officers entered the apartment with a search warrant and seized the shotgun which was in plain view in the bedroom near where Mr. Briddle was standing. In the present case, we are talking about a full-blown search and inventory which occurred at a time after the Defendant had been removed from the apartment, and after the scene had been "secured" and which lasted several days. As Lieutenant Fuller testified, none of his metro officers participated in any search and they seized nothing in the apartment, but merely secured the scene and waited for the investigative forces to arrive. The State also relies on *U. S.* v. *Lee*, 308 F.2d 715 (4th Cir. 1962) for the

proposition that the arresting officers have the authority to conduct a search at the Defendant's apartment. The *Lee* case was decided seven years prior to and is controlled by the Supreme Court's holding in *Chimel* v. *California*, 395 U.S. 752 (1969).

In the case at bar, the arresting officers merely secured the crime scene and then a team of trained investigators conducted a thorough search and inventory of the apartment which lasted several days. The State boldly asserts that "nothing in *Chimel* alters this right of police officers to secure their arrests by inspection of the premises". This statement is only true to the extent that "inspection of the premises" means observing objects in plain view in the immediate area and control of the arrestee "there is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself." *Chimel, supra.*, P. 763. In essence, the holding in *Chimel* was to limit the scope of any search to the area immediately surrounding the arrestee to prevent the arrestee from seizing a weapon or destroying any evidence that might be near him. In the present case, no seizure was made of any item by the metro officers who effected the arrest. Therefore, any search could not be incidental to the arrest. There was no testimony that the vial of heroin in the bathroom was observed or seized by any of the metro officers. In fact, nothing was seized by the metro officers. The weapon was observed by the metro officers, but it was not seized, nor according to Lieutenant Fuller's testimony, was the caliber determined until a later search of the apartment.

The State also argues that there was a constructive seizure of the heroin. Although the State failed to explain what constructive seizure is, it is clear upon examination of *U. S.* v. *Glassel*, 488 F.2d 143 (9th Cir. 1973) as cited in their brief, that their argument is without merit. In *Glassel*, the constructive seizure was such because the agent was lawfully in the apartment with the contraband in his control at the time of the arrest by the other officers.

The State also opposes the Defendant's motion to suppress on the basis of the theory the State coins "homicide scene investigation". Assuming that such a theory has any validity, the condition precedent to such a search is that there be a homicide. Lieutenant Fuller, in his testimony, stated that the crime scene was turned over to Officer Renya, and that the search commenced subsequent to the removal of the wounded, and prior to the time that they were notified that there was in fact a homicide. Although the prosecutor was able to find additional cases in other jurisdictions which he alleges support his homicide scene investigation theory, we need only be concerned with this jurisdiction. The Ninth Circuit is the only Federal court which has dealt with this issue. *State* v. *Sample*, 107 Ariz. 407, attempted to overrule Arizona law as set forth in *State* v. *Lenahan*, 471 P.2d 743. The *Lenahan* decision held, citing *Katz* v. *U. S.*, 389 U.S. 347 (1967) that a warrantless search was per se unreasonable unless it came within one of the few delineated exceptions, namely, (1) consent, (2) exigent circumstances, (3) incident to a lawful arrest. In *State* v. *Sample*, in its attempt ot reverse the *Lenahan* decision, the Court held that "warrantless search by Officer of mobile home where body of defendant's wife was discovered, two hours after arrest of defendant, was permissible and fruits of search were admissible against the defendant, since nothing in the constitution prevents police from making a warrantless search of the premises in which a victim is found dead and, such is true even if the defendant exercised joint control of premises along with the victim." *State* v. *Sample* was reversed by *Sample* v. *Eyman*, 469 F.2d 819 (9th Cir. 1972). In *Sample* v. *Eyman*, the Ninth Circuit in reversing the Arizona Supreme Court held "the record below clearly indicates this was not a search incident to a lawful arrest, and under the circumstances present, a search warrant was necessary. There was no danger that evidence would be destroyed since the dwelling was guarded by policemen. The appellee having given no reason why a warrant could not be obtained, we find a failure to have done so constitutional error." The Arizona Supreme Court al-

though reversed by the Ninth Circuit has in two subsequent cases attempted to make a distinction. In *State* v. *Duke*, 518 P.2d 570 the Arizona Supreme Court held in a case clearly limited to its facts, that where the defendant had called the officers to the scene of the crime, and the victim of the crime was in fact a resident of the premises, and where the officers had relied upon the defendant's statements that the deceased had committed suicide, that the officers had the authority to conduct a search of the area, "relying at first on the representations of the defendant that the deceased had committed suicide. Under these circumstances, a contemporaneous warrantless search of the scene of the crime at the time of the discovery of the body was, we believe, reasonable . . . ." *Duke, supra.* P. 574.

In the present case, police were not called to the scene of the crime by the Defendant, they were not called to the scene of a homicide, the deceased was not in fact a resident or one who exercised any control over the premises, and the search was not limited in scope, but lasted three to four days and resulted in an inventory of all the contents of the apartment.

The prosecution also cites *State* v. *Superior Court*, 110 Ariz. 281 a 32-word decision which gives no facts, but held "where the police are called to the scene of a homicide, they may lawfully investigate such portions of the premises as are reasonably necessary to establish the true facts of the homicide". We find the words of *Sample* v. *Eyman, supra.* more compelling. The search was not conducted contemporaneously with the arrest, and there was no danger that evidence would be secreted or destroyed since the apartment was being guarded by policemen. The State, having given no reason why a warrant could not be obtained, had no right to search the defendant's apartment. The exception as delineated by the Arizona Supreme Court refers only to scenes in which a homicide victim is discovered. In the instant case, the search began before there was a homicide. Therefore, the cases cited by the State are inapplicable to the facts of this case. In any event, this Court is

obligated to follow the ruling of the 9th Circuit and to suppress all evidence resulting from the unlawful search.

For all the foregoing, the Defendant's motion must be granted.

RESPECTFULLY SUBMITTED this 3rd day of February, 1975.

BOLDING, OSERAN & ZAVALA

By /s/ Richard Oseran
RICHARD OSERAN
P. O. Box 70
La Placita Village
Tucson, Arizona 85702

[Certificate of Service Omitted in Printing]

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

No. A-26666

MARY ANNE RICHEY
Judge of the Superior Court

Date February 7, 1975

STATE OF ARIZONA, PLAINTIFF

v.

RUFUS JUNIOR MINCEY, DEFENDANTS

MINUTE ENTRY

IN MATTER UNDER ADVISEMENT:

The Court having taken the matter under advisement rules as follows:

IT IS ORDERED the Motion to Suppress based on unlawfulness of arrest is DENIED.

IT IS ORDERED that M tion to Suppress based on unlawfulness of search and seizure is DENIED as to any items seized on October 28, 1974 and October 29, 1974.

IT IS ORDERED that Motion to Suppress statements is GRANTED as to use of same in the State's case in chief.

IT IS ORDERED that Motion to Suppress statements for use for impeachment, if same is appropriate, is DENIED.

IT IS ORDERED that Motion to Reconsider ruling on Motion to Sever is DENIED.

CC: Court Admn.
County Attorney
Bolding, Oseran & Zavala
Main Office (Mary Alice Martin)

MAXINE MOWRER
Deputy Clerk

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA, COUNTY OF PIMA

EXCERPTS FROM MINCEY'S JURY TRIAL—
MAY 29, JUNE 3, AND JUNE 6, 1975

TESTIMONY OF MORRIS REYNA, JR.

DIRECT EXAMINATION

• • • •

[26] Q And about how long after you arrived there, was it before the victims were removed from the apartment?

A Very short period of time, I don't believe it was over two minutes at the most. A very short period.

Q This was accomplished primarily by Fire and Rescue people?

A Fire Rescue people and ambulance personnel.

Q Then, what did you do once they were removed?

A I went again to make sure that we had secured in the hallway, as I proceeded to use Officer Lynch to assist me in crime scene investigation. I also had the ID Technicians, the photographers respond to the scene and proceeded to photograph everything.

• • • •

[46] MORRIS REYNA, JR.,

was recalled as a witness for the State and, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION (RESUMED)

BY MR. HOWARD:

Q Detective Reyna, were you there on the 28th of October during the time that or during the entire time that Bill Condron, the Police Illustrator, was making his measurements and sketches?

A Yes, sir.

Q And during that same period of time, photographs were being taken?

A Yes, sir.

Q Do you recall who the photographers at the scene were?

A O'Sullivan and Mr. Scott.

Q And did they take photographs at your direction?

[47] A Yes, sir, they did.

Q Had you been assigned by some individual to investigate with regard to the crime scene itself?

A Yes, Sergeant Bunting, head of the Homicide Detail, had responded to the apartment and upon arrival there, informed me that I was to take charge of the crime scene investigation.

Q Did he arrive there at the same time you did or afterward?

A About the same time, I believe he got there just a few minutes after I did.

Q And was Officer Lynch assigned to aid you in the crime scene?

A Yes, he was.

Q And did he work there under your investigation?

A Yes, he did.

Q When you arrived at the scene, was there any search or crime scene investigation under way?

A No, sir, the only thing that had been done was to render aid to the injured parties and securing of the scene.

Q You didn't see anybody search or move things around, Metro agents or things like that?

[48] A I saw no one conducting a search of that type.

Q Then did you and Officer Lynch, under your direction, search the residence systematically?

A Yes, sir, we did.

Q Starting with the bedroom, did you search the bedroom?

A Yes, I did.

Q What did you find, if anything, on the bed in the bedroom?

A On the bed in the bedroom I found a Llama .380 semi-automatic pistol, commonly referred to as an auto-

matic pistol. Also I found some expended brass casings, three-eighths casings, that had been already fired and essentially that was all on the bed. On the headboard of the bed, there was a jar of lactose.

MR. OSERAN: I would object to what was in the jar unless this officer performed tests that would indicate the contents of that jar.

• • • •

[71] A Yes, I did. Going from the dresser at the foot of the bed, I found a roll of tin foil. Right next to it on the chair, I found a green off-duty Air Force shirt, with objects inside the shirt pockets. Then in the chest of drawers, in the right corner of the diagram, I found a box of Hirtemberg, Austrian ammunition, which contained seventeen live cartridges and also found other objects of men's clothing in that chest of drawers and other objects throughout the apartment.

• • • •

[87] Q By the use of State's Exhibit 54 then, can you illustrate your testimony concerning the box of Hirtemberg ammunition?

A Yes, the photo shows the box there of Hirtemberg ammunition, which was found in the chest of drawers in the bedroom, and shows the position in the drawer, as we initially discovered it.

Q Thank you. Did you have occasion—you mentioned a jacket or an Air Force fatigue coat or shirt on that chair. Did you have an opportunity or did you search the pockets of that jacket?

A Yes, sir, I did.

[88] Q What did you find in the pockets?

A In the left pocket, I found a—

MR. OSERAN: Excuse me, your Honor, I would like a little more foundation as to what day the pockets of the shirt were searched?

BY MR. HOWARD:

Q When did you search the pockets?

A On that evening, 28th of October, on my initial search of the scene.

Q What did that search reveal?

A There were two pockets in the shirt on the front. A left pocket had life savers, a pin that said, "U.S. Government" and I believe a chap stick. The other pocket had a green wallet containing identification, "Rufus Mincey", some fourteen papers of white powder, greyish powder, which was analyzed by the Crime Lab to be determined—

MR. OSERAN: I object to any conclusion as far as—

THE COURT: Sustained, as to any conclusion as to what it contained.

BY MR. HOWARD:

Q That was submitted later on to the Crime Laboratory?

A That was submitted later on.

[89] Q And can you describe these papers you are talking about?

A They are not actually papers, they are referred to as papers. They were of aluminum foil and they were then folded, from little squares, with the powder contained in, in a triangular type shape. There were fourteen of them, plus a Twenty Dollar Bill, in one plastic envelope, that was in the pocket. There was also a metal tube, which I called a "toilet tube" type of tube. That toilet roll fits on the holder in the restroom and besides being hollow, and the spring being removed, inside there I found two larger papers of heroin, containing a bigger quantity than the others, plus some cotton.

MR. OSERAN: I would object and ask that the answer be stricken.

THE COURT: Sustained. I caution you in your testimony not to refer to what it contained.

MR. OSERAN: He knows better than that.

THE COURT: Yes, that should be testified to by a chemist.

MR. HOWARD: Refer to what you saw?

THE WITNESS: Powder substance in the aluminum foils.

[90] BY MR. HOWARD:

Q I show you State's Exhibit 36 and ask you to examine the contents of that envelope and turn in your chair.

A I do recognize this.

Q What does State's Exhibit 36 consist of?

A It consists of the green wallet, One Hundred and Twenty Dollars in cash and the identification of Rufus Mincey, the same items I found in the right front pocket of the green work uniform shirt.

Q When you say identification, can you describe that in more detail?

A Yes, there are some items with his pictures, Military Identification Card with his name and photo on it.

Q And also a driver's license?

A Yes, driver's license.

Q I show you what has been marked as State's Exhibit number 42 and ask you to examine it in the same fashion. These items, State's Exhibit number 36 appear to be in substantially the same condition as when you first removed them from the pocket of that jacket?

A Yes, sir.

[91] Q What is contained in State's Exhibit number 52?

A That contains the metallic, what I called the toilet rod, fourteen foil papers of heroin—

MR. OSERAN: I'm going to object.

THE COURT: Now—

MR. OSERAN: Your Honor, I would ask the Court to caution this witness.

THE COURT: I have, Mr. Oseran, and I will take care of it without your help.

MR. OSERAN: Thank you.

THE WITNESS: And the fourteen papers of powder substance, the metallic tube, some cotton, and the two larger papers of the powdered substance. In addition, it also contained a Twenty Dollar Bill, along with the fourteen papers in a separate plastic envelope.

BY MR. HOWARD:

Q Was that plastic envelope part of the property removed from the pocket?

A That was the way I found it in that plastic bag and those items were kept in that plastic bag.

* * * *

[128] Q Did you find there or anywhere else any burned spoons?

A I did not locate any burned spoons anywhere in the apartment. I even checked this area (indicating), which is the cupboard and the drawers, where all the silverware was. I did not locate any spoons that showed signs of [129] being burned.

Q Did you find any cotton swabs, cotton balls in the apartment?

A I found no cotton balls with the exception of cotton that was contained within the metal tube, that I found in the green shirt. That is the only cotton that I found.

Q Back in the immediate room then, did you locate any syringes in the bedroom?

A Yes, I did.

Q Where?

A I located a syringe on top of this table (indicating) in this approximate location there.

Q Did you locate on the floor or furniture in the apartment, anywhere else, another syringe?

A I believe I located one other syringe, an insulin syringe, either here (indicating) or in a drawer. I don't recall the exact location, but those are the only two syringes I located.

Q And no cotton balls on the floor?

A I could not find any cotton balls.

* * * *

[132] Q You had to pull the carpet up then and [133] that picture shows the carpet pulled up in a fashion that you pulled it up, is that right?

A Yes, I had to actually tear the carpet up, from where it was fastened onto the ground, and actually cut the carpet in order to be able to do this.

* * * *

[150] Q Do you know the total number of items that were taken into evidence?

A Between two and three hundred items.

* * * *

TESTIMONY OF DR. MARTIN SILVERSTEIN

DIRECT EXAMINATION

[23] A On the x-rays, there was a projectile appearing, a foreign body appearing to be a bullet wound adjacent to the neck of the right femur, that is the right hip bone, as it passes toward the pelvic bone.

Q Could you tell anything, Doctor, about the angle that bullet entered or the point on which it passed as it passed through the flesh of Mr. Mincey?

A Not with great specificity. The track was very short for a wound from entrance of the position of the bullet within the buttock and it is impossible to identify a track unless one examined it surgically or at post-mortem because of deflection by tissue and bone and this bullet had struck a portion of the pelvic bone and a portion of the neck of the thigh bone, the femur.

* * * *

[26] Q Now, Doctor, I think the question was, what was Mr. Mincey's condition upon arrival at the hospital?

A He had a gunshot wound in the right [27] buttock and he was apnic or breathing insufficiently so he required ventilatory or respiratory resuscitation. In addition, he required drugs to counteract the—

MR. OSERAN: Excuse me, Doctor, I would show an objection again.

THE COURT: Overruled.

THE WITNESS: —as part of that treatment.

BY MR. HOWARD:

Q Doctor, could you just tell us what drug it was that was administered?

A Among the resuscitative drugs, he received Narcan.

Q What was the condition of his lower extremities upon his arrival at the hospital?

A Since he was depressed almost to the point of coma, it was very difficult to examine function in the lower extremities at this time. There was some reason to believe that he did not respond well to stimuli applied to the gunshot wound.

Q And what would that mean, what kind of stimuli are we talking about and what does that mean in layman's terms?

A It means being pricked with a pin or the [28] end of a specific instrument. Normally a patient would withdraw from a pin prick. However, if you can't feel the pin prick or if he is paralyzed and cannot withdraw, then the limb doesn't move and that is what happened in Mr. Mincey's case.

Q You mentioned the projectile being near or in deep muscle tissue and near a specific nerve. What nerve are we dealing with here?

A The sciatic nerve, long nerve of the limb, lower limb.

Q And was there any evidence in your examination, either at that time or in the patient's early course in the hospital indicating damage to that nerve?

A Yes, there was. The patient was unable to move the limb adequately and detailed examination indicated that nerve roots, L 4 and L 5, which compose a portion or comprise a portion of that nerve, were injured.

Q And generally, what is the sciatic nerve, what functions does it have?

A It controls almost all the large muscle movements within the lower leg and particularly the foot, calf, knee joint.

* * * *

TESTIMONY OF RUFUS MINCEY

• • • •

CROSS EXAMINATION

[231]

Q You're quite sure that Officer Headricks fired at you first?

A Yes, sir.

Q You saw a gun in Officer Headricks' hand?

A Yes, sir.

Q What kind of gun?

A It was just a gun.

Q You don't know what kind?

A No, sir.

Q You'd seen Chuck's gun. It was a .38; is that right?

A Yes, sir.

Q And Mr. Hodgeman you testified didn't have a gun?

A No, sir.

Q Because you gave him yours?

[232] A Yes, sir.

Q Do you recall being—testified—being asked some questions by Detective Hust at the hospital, U of A Hospital on the evening of this occurrence?

MR. OSERAN: Ask for some foundation, where and when.

MR. HOWARD: I haven't gotten there.

THE COURT: Let him get there, Mr. Oseran. And the record may show your continuing objection to this.

MR. OSERAN: Fine. And could he ask him also—

MR. HOWARD: Could we approach the bench, if counsel is going to argue.

MR. OSERAN: I want to lay a foundation as if he knows who Detective Hust.

THE COURT: Well, I think the proper way to do that, Mr. Oseran, is to let him lay the foundation he wishes to lay. And if you don't think it's right, you may object. But don't tell him how to do it.

MR. OSERAN: Fine, Your Honor.

Q (By Mr. Howard) I think your answer was yes, or no?

A The guy came to see me in the hospital.

[233] Q A detective with the police department?

A He said he was a policeman.

Q Showed you his identification?

A Yes.

Q And was he with a nurse?

A Yes, they woke me up.

Q It's a nurse that was a nurse in the Intensive Care Unit during the time you were there?

A I guess she was working Intensive Care Unit. That's where I was at.

Q But you got to know her afterwards. Do you remember it's the same nurse?

A No, sir, I remember seeing her earlier when we—when we first started this. And she came in.

Q Do you remember seeing her at that time?

A Yes, sir.

Q With the detective, the fellow that said he was a policeman?

A Well, she could have been the same one. I know it was a nurse that came in there with him.

Q And do you recall him advising you of your rights?

[234] A Well, first he told me that I shot a policeman.

Q Okay. Then he advised you of your rights?

A Yes, sir.

Q And he asked you if you would, in light of those rights, talk to him?

A Well, he asked me if I knew Chuck's identification, where he worked and where he lived.

Q Okay. And then he asked you some questions about the incident?

A Sir?

Q Then he asked you some questions about the incident?

A Well, he was just talking, mostly, you know, he gave the impression that he was concerned as to how my health was and how I was feeling. That's the impression he gave.

Q Well, I'm asking—you got that impression from him?

A Yes, sir.

Q I'm asking you if he asked some questions about the incident?

A Yes, sir.

Q And you answered those questions by [235] writing the answers; is that right?

A Well, I was trying to help him the best I could.

Q Okay. And it was in this helpful attitude that you wrote the answers to questions; is that right?

A Well, I was trying to answer to the best of my recollection at the time that this was going on.

Q Okay. And you had to write the answers because you had some tubes in your mouth, right?

A Yes, sir.

Q And you wrote the answers in your own handwriting?

A Yes, sir.

Q Do you recall being asked, or do you recall telling Detective Hust at that time that you weren't even sure that the guy who came in the bedroom had a gun?

A I can't say for sure because I don't know what I—which guy he was talking about.

Q You didn't know from the context of what he said what guy he was talking about?

A No, sir.

Q It wasn't when he was talking to you about what went on at the moment that these [236] police officers entered the apartment, he was—that he was asking you that?

A He asked me a lot of different things.

Q The question is: Do you recall telling him that you weren't even sure that the guy that came in the bedroom had a gun?

A Well, I can't say for sure.

Q You don't know?

A I—right.

Q You're sure now that he had a gun?

A Well, I know the guy that shot me, Brian, I know that he had a gun.

Q He's the guy that came in the bedroom at the point of entry?

A There's no telling what time he was talking about.

Q You weren't aware of anyone else in the bedroom until you woke up on the floor over there; isn't that right?

A Right.

Q And all you remember when you woke up on the floor is somebody yelling at you?

A Yes.

Q And you didn't see any gun at that time?

A I don't know. The dude that was [237] standing up over me might have had a gun, might not. I can't say.

Q You thought he might be talking about the guy that was standing over you when you woke up over here?

A I can't say who he was talking about.

Q Do you recall being asked these specific questions? It's on the fifth page and top of the sixth.

Do you recall being asked these specific questions by Detective Hust?

"Detective Hust: Go ahead.

"A When I heard all the noise I ran out to check it out. Then I went back to the bedroom.

"Q" —By Detective Hust—"Where was Chuck?

"A (By Mr. Mincey) Where was Chuck?

"Q" —by Detective Hust—"Yes.

"A (By Mr. Mincey) (Mincey shrugged his shoulder in a manner indicating he didn't know.)

"Q —By Detective Hust—"Did this guy that came into the bedroom have a gun?

"A I can't say for sure. Maybe the [238] guy had a gun."

MR. OSERAN: I would ask that the—Your Honor, that the next question and answer be read. I think it's part of the same context of this conversation.

THE COURT: No. I don't believe so.

MR. HOWARD: I'm sure counsel can do that.

THE COURT: That's part of the context of this. If you wish to bring it out, you may.

MR. OSERAN: Fine.

Q (By Mr. Howard) Do you recall those specific questions and writing those answers?

A Well, I can't say who he was talking about because he was asking about Chuck. So there's no telling who he was talking about.

Q But he was talking about where Chuck was at the moment those officers entered the apartment, was he not?

A Yes.

Q You didn't tell Officer Hust at that time that the officer shot you first, did you, Mr. Mincey?

A He didn't ask me.

Q He did ask you at one point in there if you had anything else to add, didn't he?

[239] A Yes, sir. I think my answer at that time was I couldn't say anything without seeing a lawyer first.

Q Did you see your—did you see your bullet strike Debbie?

A No, sir.

MR. OSERAN: I would object to the question, Your Honor. It's—there's no testimony to believe that his bullet struck Debbie. That—that bullet was lost.

MR. HOWARD: Your Honor, I think that's the only evidence that there is that it was a .380.

THE COURT: You may ask the question that way.

Q (By Mr. Howard) And did you see her move to the closet?

A Yes, sir.

Q You never saw a badge at any time in that apartment?

A No, sir.

Q You didn't have any idea that you were being arrested?

A No, sir.

• • • •

[252] Q (By Mr. Howard) Well, let me ask a further question. You suspected that it might be an arrest, a bust, didn't you?

A No, sir.

Q That never entered your mind?

A At what time?

[253] Q At the time that Officer Headricks was coming across this room and you went and got your gun and started firing at him?

A No, sir.

Q Never entered your mind?

A No, sir.

Q Do you recall him asking you these questions, giving these answers:

"Q" From Detective Hust—"What do you mean, 'all hell broke loose'?"

"Mincey: When he came back, a bust took place.

"Q A what took place? I can't read that word?

"A Bust. Bust."

MR. OSERAN: Excuse me, Your Honor.

Q (By Mr. Howard) "Question—

MR. OSERAN: Excuse me, Mr. Howard. This is not on the written statement, bust. Bust. And I would ask that that be stricken from the record.

If Mr. Howard wants to look at the written statement and correlate it, he'll see that that word does not exist twice.

THE COURT: Well, you may bring that out.

• • • •

[255] Q (By Mr. Howard) In answer to, "What do you mean, 'all hell broke loose' "? The text that I have says, "When he came back a bust took place."

THE COURT: I've lost it. Well—

MR. OSERAN: Looks—

THE COURT: Maybe you'd better tell me now, Mr. Oseran.

MR. HOWARD: I'm sure Detective Hust can straighten it out on this point.

MR. OSERAN: Well, here it is, right here.

THE COURT: Bring it up here, if you would please.

(Whereupon, document is handed to the Court.)

(Whereupon, an off-the-record discussion was had at the bench out of the hearing of the jury.)

THE COURT: All right. We only have one bust.

MR. OSERAN: I think that clarifies it, [256] Your Honor.

THE COURT: Very well.

Q (By Mr. Howard) Did you tell Detective Hust that when he came back—

MR. OSERAN: Your Honor—

Q (By Mr. Howard)—a bust took place?

MR. OSERAN: Asked and answered, Your Honor.

THE COURT: I think we're trying to clarify what the objection was.

THE WITNESS: Okay. Putting it together with what happened.

Q (By Mr. Howard) Did you tell him that?

A Tell him what, that a bust took place?

Q Yes.

A He had already told me that a policeman had been killed, so that's the only thing that could have happened.

Q And then were you also asked what took place? I can't read that word.

And then you—you wrote the word bust, single time.

A Well, he asked me what the word that I wrote in the first sentence.

• • • •

[290] REDIRECT EXAMINATION

Q When you first saw Brian with his gun in his hand in the hall coming towards you, did you stop and form an opinion as to what was happening?

A No, sir. I was reacting.

Q How did you react?

A Just the first thing I could do, turn around and get out of the way and get my gun.

Q Did you ask him if he was a police officer, if he was coming in to rob or kill you?

A No, sir.

Q Were you frightened at that time?

A Yes, sir.

[291] Q Did you think that you were going to get killed at that time?

A I thought he was going to shoot me.

Q Did he shoot you?

A Yes, sir.

Q Do you remember an officer Mr. Howard named as Officer Hust coming to talk to you in the hospital?

A I don't remember his name. I remember he came to see me.

Q And where were you in the hospital when he came to see you?

A In Intensive Care.

Q Can you describe what condition you were in at that time?

A Well, I know I couldn't move my leg. It was hurting pretty bad. As a matter of fact, the pain was unbearable.

Q Did you tell him the pain was unbearable?

A Yes, sir.

Q Did you have anything in your arms?

A Yes.

Q What did you have in your arms?

A I had—they had me hooked up to some needles, intravenous needles in my arms.

[292] Q Did you have any other tubes in your body?

A Yes, I had tubes down my throat, tube in my penis.

Q Did you have any tubes in your nose?

A Yes.

Q And that is the condition you were in when you were interrogated by the officer?

A Yes, sir.

Q Did you tell the officer several times that you really weren't clear on what had happened?

A Yes, sir.

Q Did you ask the officer at least a half a dozen times if you could have some legal guidance or an attorney?

A Yes, sir.

Q Did you ask the officer who the police officer was that was shot?

A Yes, sir.

Q Or which one the police officer was?

A Yes, sir.

Q Mr. Howard remembered if you asked—do you remember the officer asking you: "Did you have a gun?

"When I heard all the noise I run [293] to check it out and then I went back to the bedroom."

And then the next question the officer asked you was: "Where was Chuck?"

And you said: "Where was Chuck?"

And the officer said: "Yes."

MR. HOWARD: I'm going to object, Your Honor. I don't have any objection to him having the whole statement come in but I object to counsel just reading—

THE COURT: Overruled. I think he's getting to a question.

MR. OSERAN: Yes, I am, Your Honor.

THE COURT: And he's filling in.

Q (By Mr. Oseran) And then the officer said to you: "Did this guy that came into the bedroom have a gun?"

And you answered: "I can't say for sure. Maybe the guy had a gun."

Do you know whether he was referring to the guy that was standing over you saying, "Move, Nigger, move," or Brian?

A I don't know who he was—which guy he was talking about.

Q Did you know Brian had a gun?

A Yes, sir.

[294] Q How did you know? Because he shot you?

A Yes, sir.

Q Immediately after you said, "I can't say for sure. Maybe the guy had a gun," do you recall the officer asking you: "I would rather you stopped talking to me than to lie to me. If you're telling the truth, your story will be the same as John's and others."

Do you recall your response: "I don't tell any lies. I don't have to make things up to make the lie look like the truth. Let John talk all he wants. All he can tell is the truth or get caught telling a lie."

Do you recall telling him that?

A Yes, sir.

Q Do you remember the officer that was interrogating you having to leave the room and come back?

A Every time he left and came back, like I wasn't too sure it was the same guy or another day or what.

Q Did you later learn that that was all within a short period of time?

A Yes, sir.

Q Did you also learn the reason they left [295] the room was because you became exhausted and unconscious?

A Yes, sir.

Q Did you answer his questions to the best of your ability at that time in your condition?

A Yes, sir.

Q Did you tell the officer you were giving him the question (sic) to—to help him and to help bring the case to a close?

A Yes, sir.

Q Did you tell him you were telling the truth?

A Yes, sir.

Q To the best of your ability at that time?

A Yes, sir.

Q You didn't talk to him and tell him those things?

A No.

Q Why didn't you talk to him?

A I couldn't talk at the time.

Q Why couldn't you talk?

A Well, I had these tubes in my mouth and in my nose.

Q And you asked for a lawyer six times. [296] Did the officer tell you anything?

A Well, I don't know how many times I asked him, but I had asked him a group of times if he could get me a lawyer.

Q Did you tell him when you're charged with murder you don't—they won't have to prove you did it; you have to prove that you didn't do it?

A Yes, sir.

Q Is that how you think this system works; that you have to prove that you didn't do something?

A Yes, sir.

• • • •

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

No. A-26666

Date June 12, 1975

MARY ANNE RICHEY
Judge of the Superior Court

STATE OF ARIZONA
Plaintiff

RUFUS JUNIOR MINCEY
Defendants

JAMES HOWARD
Plaintiff's Attorney

RICHARD OSERAN
Defendants' Attorneys

MINUTE ENTRY

(VERDICTS)

JURY TRIAL—FIFTEENTH DAY

2:51 P.M. Defendant present. Same counsel present. Court Reporter Myron Stolle reporting.

Comes now the Jury under the charge of the bailiff, Francis Copham, and through their foreman announce that they have arrived at their verdicts in the case.

The Clerk reads the verdict of guilty of MURDER. First Degree, Count I, and inquires of the jurors if this is their verdict and the verdict of each of them, and they say that it is and so say they all.

The Clerk reads the verdict of guilty of ASSAULT WITH A DEADLY WEAPON, Count II, and inquires of the jurors if this is their verdict and the verdict of each of them and they say that it is and so say they all.

The Clerk reads the verdict of guilty of UNLAWFUL SALE OF NARCOTICS, Count III, and inquiries of the jurors if this is their verdict and the verdict of each of them and they say that it is and so say they all.

The Clerk reads the verdict of guilty of UNLAWFUL

MAXINE MOWRER
Deputy Clerk

MINUTE ENTRY

Page No. 2

Date June 12, 1975

Case No. A-26666

POSSESSION OF NARCOTIC DRUG FOR SALE, Count IV, and inquires of the jurors if this is their verdict and the verdict of each of them and they say that it is and so say they all.

The Clerk reads the verdict of guilty of UNLAWFUL POSSESSION OF A NARCOTIC DRUG, Count V, and inquires of the jurors if this is their verdict and the verdict of each of them, and they say that it is and so say they all.

On request of Mr. Oseran, the Clerk polls the Jury on Count I.

Jury is dismissed.

IT IS ORDERED that time of sentencing be set for July 1, 1975, 9:00 A.M.

Mr. Oseran moves for judgment of acquittal pursuant to Rule 20, notwithstanding the verdict as there is no substantiated evidence as to Count I, First Degree.

IT IS ORDERED the motion is denied.

Court stands at recess.

CC: Court Admn.
County Attorney
Bolding, Oseran, Barber & Zavala
Dept. Public Safety
Sheriff
Adult Probation

FILED IN COURT: Verdicts 5
Jury List
State's Requested Instructions
Deft's Requested Instructions
Sentencing Notification

MAXINE MOWRER
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Banc

No. 3283

STATE OF ARIZONA, APPELLEE,

v.

RUFUS JUNIOR MINCEY, APPELLANT.

Appeal from the Superior Court of Pima County

(Cause No. 3-26666)

The Honorable Mary Anne Richey, Judge

Affirmed in Part and Reversed and Remanded in Part

BRUCE E. BABBITT — Phoenix
Attorney General

HEATHER A. SIGWORTH — Tucson
Assistant Attorney General

Attorneys for Appellee

RABINOVITZ, MINKER & DIX, P.C. — Tucson
BY ALBERT PERRY DOVER

BOLDING, OSERAN & ZAVALA — Tucson
BY RICHARD S. OSERAN

Attorneys for Appellant

GORDON, Justice:

Appellant, Rufus Mincey, was convicted in a jury trial of murder, first degree, in violation of A.R.S. §§ 13-451, 13-452 and 13-453, assault with a deadly weapon in violation of A.R.S. § 13-249 B, unlawful sale of narcotics in violation of A.R.S. § 13-1002.02, unlawful possession of narcotic drug for sale in violation of A.R.S. § 36-1002.01, and unlawful possession of narcotic drug in violation of

A.R.S. § 36-1002. He was sentenced to serve a term of life without possibility of parole until twenty-five years are served for Count I; to serve not less than ten nor more than fifteen years for Count II, to run concurrently with the life sentence; to serve not less than five years nor more than fifteen years for Count III, to run consecutively to the life sentence; to serve not less than five years nor more than six years for Count IV, to run concurrently with Count III; to serve not less than two years nor more than three years for Count V to run concurrently with Count III. We have jurisdiction to review this judgment under A.R.S. § 13-1711. The judgment of the trial court is reversed and remanded as to Counts I and II; judgment is affirmed as to Counts III, IV and V but remanded for resentencing.

This appeal arose out of a tragic incident in Tucson, Arizona on October 28, 1974. It began with a planned "buy-bust" by the Metropolitan Area Narcotics Squad, based originally on information from an informant. Although the testimony conflicts in some areas, on appeal we view the evidence in the light most favorable to upholding the verdict. The facts for the purpose of this appeal are as follows:

Sometime around 2 p.m. on October 28, 1974 undercover agent Barry Headricks of the Metropolitan Area Narcotics Squad went to the apartment leased by appellant. Accompanying Headricks was Charles Ferguson, the victim in the assault with a deadly weapon charge. Headricks, according to testimony, looked like a typical undercover narcotics officer: mustache and longish hair, cowboy boots, levis and a levi jacket. He also had a electronic monitoring device so that the other agents could overhear what went on.

After Headricks and Ferguson were admitted, a deal was made for the sale of a specified amount of narcotics and both appellant and Ferguson were charged with this sale. While in the apartment Headricks saw a gun in the possession of another man (probably Ferguson) in appellant's apartment. (Also in the apartment was appellant's girlfriend. When the agents returned later there were two more people in the apartment.) Headricks then

left the apartment with the purported purpose of returning with the money to pay for the drugs. Actually Headricks met a fellow agent and they and eight other officers prepared to carry out the prearranged plan to consummate the "buy-bust". [1]

Headricks and another agent (Schwartz), purportedly his "money man", went up to the door of the apartment with drawn guns hidden behind their backs. Eight other agents and a deputy county attorney were to be waiting with drawn guns out of sight of the doorway; in fact John Hodgman, who opened the door, apparently saw the other agents and tried to close the door. Headricks knocked on the door and when the door opened he announced that it was the police, according to one officer's testimony. Hodgman tried to close the door as Headricks slipped into the apartment. Agent Schwartz prevented the door from closing and he and other agents forced entry. As the door was forced back, Hodgman was pushed partly through the wall behind the door. Schwartz and at least one other agent held Hodgman to the ground and handcuffed him. Schwartz pointed his gun at a woman who was in the room and told her "police, freeze". Moments later another agent pointed his gun at her and, in more obscene terms, told her to freez or he'd blow her head off. At some time during these occurrences, a number of shots in rapid succession could be heard coming from the bedroom at the back of the apartment which Headricks had entered. It was later shown that both men emptied their guns shooting at each other. (One bullet, later shown to be from appellant's gun, came through the wall and grazed Ferguson's head where he was being held at gunpoint against the wall by another agent. Both men went down to the floor. This incident was the basis of the

[1] A "buy-bust" occurs when the undercover agent or agents make contact with a person who allegedly has illegal drugs for sale and make an offer to buy. If the agent sees the drugs or has enough information to be sure that the person does have the drugs, then an arrest is made. Commonly, as here, the plan is for the agent to leave momentarily and then a number of agents will come back to make the arrests. The usual plan is for the original undercover agent to get the door opened using his undercover identity and then the rest of the agents rush in.

assault with a deadly weapon charge.) Shortly after the shooting stopped, Headricks came out of the bedroom, said something like "he's down," and fell to the ground. Some agents ran to Headricks to give aid and someone called for emergency assistance. Meanwhile Agent Fuller went to the bedroom door and yelled "police officer, freeze" or "come out" or something of that nature. Fuller testified that he saw a movement on the other side of the bed and then nothing more. Fuller and another agent entered the room, proceeding along the side walls. Fuller saw a woman lying on a closet floor and asked her if she was all right. When she said no he told her to stay there and help would come soon. Fuller then crawled across the bed and found appellant lying on his back on the far side of the bed, with no visible wounds and with an automatic pistol under his hand. Appellant failed to respond to speech or to being prodded with Fuller's pistol. When the agents tried to move Mincey they saw blood underneath him and so they left him there until the ambulance came.

No weapons other than the pistol found near appellant's hand were found on any of the suspects. That weapon, a Llama .380 semi-automatic, was found to be empty when one of the agents examined it. Three other weapons were found in the living room during a subsequent search. Headricks' police special .38 revolver was also empty and was later shown to be the weapon which made those bullet holes not shown to have been caused by appellant's gun. When Headricks was taken out on a stretcher, a small semi-automatic pistol was found on the floor under where his body had been. Testimony at trial speculated that he had been carrying this second pistol in his belt at his back as is a common practice among undercover narcotics agents. The presence of the fourth pistol was not explained at trial, but it apparently had not been recently fired.

After the shootings, the narcotics agents did no investigating but waited for a special investigative team in accordance with Tucson Police Department procedure. The investigating officers searched the premises and examined the scene over a period of four days. No search warrant was obtained and no reason appears for not seeking one.

Although no witness was absolutely sure, the officers apparently learned of Headricks' death after the search of the scene began.

Three or four hours after appellant arrived at the hospital emergency room, Office Hunt interrogated him in the intensive care unit. Appellant was being fed intravenously, had a tube down his throat giving him oxygen to help him breathe, a tube in his nose down into his stomach to keep him from vomiting, and a catheter tube to his bladder. A nurse in the intensive care unit allowed the police officer to question appellant although appellant was unable to talk and had to answer by writing notes. Some of these answers were used in an attempt to impeach appellant by prior inconsistent statements at trial. Appellant was in pain but there is no evidence that he was sufficiently under the influence of medication to render his statements involuntary and inadmissible.

The interrogation began with questions concerning another wounded suspect. Then appellant learned he was charged with killing a police officer and was given his *Miranda* rights. The trial court granted appellant's motion to suppress this interview as to its use in the prosecution's case in chief but allowed its use for impeachment purposes. The interrogation lasted about one hour but the officer twice stopped the questioning when appellant either fell asleep or lapsed into unconsciousness.

On November 1, 1974 appellant was charged in a five-count indictment and on June 12, 1975 a jury returned guilty verdicts on all five counts. Appellant's motions for acquittal notwithstanding the verdict and for a new trial were denied and sentence was imposed on July 15, 1975. Thereafter appellant filed a timely notice of appeal to this Court.

Appellant raises a number of issues which we have rearranged and reworded so as to deal with them more concisely:

1. Did the jury instructions present an incorrect *mens rea* requirement for murder "committed in avoiding or preventing lawful arrest" (A.R.S. § 13-452), thereby compelling reversal?

2. Was it reversible error to permit the state to impeach appellant with statements made by him while he was in the hospital intensive care unit?

3. Was it reversible error to admit evidence that appellant had falsified information on the federal firearms form for appellant's pistol?

4. Was it reversible error to admit statements made by appellant two and one-half months before the incident?

5. Was it reversible error to deny defendant's motion to suppress on the basis of an illegal entry in violation of A.R.S. § 13-1411?

6. Was it reversible error to deny appellant's motion to suppress on the basis of an illegal warrantless search?

7. Was it reversible error to deny appellant's motion to sever the murder count from the other counts in the indictment?

8. Was the prosecutor's conduct in closing argument so inflammatory as to deny appellant a fair trial?

Mens Rea for the Murder Charge

Appellant was charged with murder "which is committed in avoiding or preventing lawful arrest", A.R.S. § 13-452. He alleges error in terms of the propriety of certain jury instructions but the underlying issue concerns the *mens rea* required for this kind of murder. This is an issue of first impression before our Court.

One challenged instruction reads:

> "If a person has knowledge, *or by the exercise of reasonable care should have knowledge*, that he is being arrested by a peace officer, it is the duty of such a person to refrain from using force (or any weapon) to resist such arrest.
>
> "However, if you find that the peace officer used excessive force in making the arrest, it is not the duty of such person to refrain from using reasonable force to defend himself against the use of such excessive force." (Emphasis added.)

The other challenged instruction reads:

> "A person who knows *or has reason to know* that he is being illegally arrested may use such force, short of taking life, as is necessary to regain his liberty.
>
> A person resisting an illegal arrest may use only that force reasonably necessary to effect that purpose.
>
> "A person who knows *or has reason to know* that he is being lawfully arrested has a duty to refrain from using any force to resist arrest." (Emphasis added.)

We agree that these instructions do not present the proper *mens rea* or scienter requirement for this kind of first degree murder. The provisions of A.R.S. § 13-452 under which appellant was charged does not expressly provide a scienter requirement. The rule, barring a few exceptions, is that wrongful intent or *mens rea* is required before there can be criminal punishment. State v. Cutshaw, 7 Ariz.App. 210, 437 P.2d 962 (1968); Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951). The exceptions occur only when the legislative power has expressly so determined, as where criminal negligence takes the place of the intent requirement. State v. Chalmers, 100 Ariz. 70, 411 P.2d 448 (1966). Where the penal statute fails to expressly state the necessary element of scienter, this Court may infer the scienter requirement from the words of the statute plus legislative intent. State v. Berry, 101 Ariz. 310, 419 P.2d 337 (1966).

We hold that the scienter requirement for first degree murder "which is committed in avoiding or preventing lawful arrest," A.R.S. § 13-452, is knowledge that the victim was a law enforcement officer. That is, a defendant is guilty under § 13-452 if the murder is committed while *knowlingly* avoiding or preventing a lawful arrest. This holding is based on the words of the statute and the legislative intent.

The words of this provision are similar to A.R.S. § 13-541 A, Resisting, delaying, coercing or obstructing public officer. This statute uses both the terms "wilfully" and "knowingly" in various provisions. We agree with the

Court of Appeals that § 13-541 requires knowledge on the part of the defendant that the other person is a public officer. State v. Tages, 10 Ariz.App. 127, 457 P.2d 289 (1969). It is logical to assume the Legislature intended a similar knowledge requirement in § 13-452.

Even more persuasive is the fact that we are dealing with a first degree murder statute which carries the most drastic penalty in our system of criminal justice—death. Such a penalty has traditionally required criminal intent as the *mens rea*, and a lesser mental state such as criminal negligence is covered in a manslaughter statute. *E.g.*, A.R.S. § 13-456. Our statute defining first degree murder, A.R.S. § 13-452, was amended in 1973 to add the avoiding or preventing lawful arrest provision. Proceeding this provision is the provision for wilful, deliberate or premeditated killing and following it is the felony murder provision. The first provision by its terms requires scienter, and the felony murder provision requires an intent to commit the underlying felony. State v. Akins, 94 Ariz. 263, 383 P.2d 180 (1963).

In this context the Legislature would not have intended the death penalty for a negligent killing nor would they have intended strict liability for killing a police officer even where the facts otherwise objectively show justifiable homicide. A knowledge requirement for first degree murder committed in avoiding or preventing a lawful arrest is mandated.

In fact, the jury was given a proper instruction because the trial court modified the state's requested jury instruction by adding the word "knowingly:"

> "A murder which is perpetrated by lying in wait or by any other kind of wilful, deliberate and premeditated killing, or which is perpetrated in *knowingly* avoiding a lawful arrest is murder in the first degree." (Emphasis added.)

So the issue is analogous to our recent decision in State v. Rodriguez, —— Ariz. ——, 560 P.2d 1238 (1977): conflicting jury instructions were given concerning the intent or *mens rea* necessary for conviction.

In *Rodriguez* we concluded under the facts of that case that the incorrect instruction was not so prejudicial as to require reversal. Two crucial facts in this determination were that other than the reading of the instructions, the incorrect instruction was never mentioned to the jury and that the correct intent requirement was "brought home forcefully to the jury in closing arguments no less than six times." State v. Rodriguez, —— Ariz. at ——, 560 P.2d at 1241.

The situation was exactly the opposite at appellant's trial. In closing argument the prosecutor emphasized the incorrect instruction, discussing it at least twelve times. The case went to the jury on an alternative theory of negligence ("knew or by exercise of reasonable care should have known"). Under these circumstances we have no way of knowing on what basis the jury determined appellant's guilt. Conviction under the avoiding arrest section of A.R.S. § 13-452 requires that the jury find the defendant acted knowingly. The jury here could have rendered a guilty verdict on the basis of negligence rather than knowledge.

For the foregoing reasons, we find the giving of the challenged instructions was prejudicial and reversible error. Accordingly, the judgment of the trial court as to Count I (murder, first degree) is reversed. Because the conviction on Count II (assault with a deadly weapon) may involve the same issues discussed *supra*, the judgment as to Count II is also reversed.

Statements in Intensive Care Unit

Under the circumstances described, *supra*, appellant was interrogated while in the Intensive Care Unit of the University of Arizona Hospital. *Miranda*[2] warnings were given, but after each indication from appellant that he wanted to consult an attorney or that he wanted to stop answering questions, the police officer continued to question appellant.

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[2] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 94 (1966).

The United States Supreme Court held in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed2d 694 (1966) that police must cease questioning when the suspect indicates he wishes to assert his right to remain silent or his right to an attorney. This mandate was recently affirmed in Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) and Oregon v. Haas, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); cf. Brewer v. Williams, No. 74-1263 (U.S., Mar. 23, 1977). Statements made in violation of this rule are not admissible in the prosecution's case in chief but may be used for impeachment purposes (if the defendant takes the stand at trial) so long as traditional standards of voluntariness and trustworthiness are met. Oregon v. Haas, *supra;* Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971).

Prior to trial appellant made a motion to suppress the statements he made while being interrogated at the hospital, arguing their inadmissibility for all purposes because of violations of the requirement of *Miranda* and because of lack of voluntariness. A hearing was held as required by State v. Owen, 96 Ariz. 274, 394 P.2d 206 (1964), and testimony and oral argument were heard by the trial court. The court granted appellant's motion as to use of the statements in the prosecution's case in chief but denied the motion as to use for impeachment purposes.

The court did not make a specific finding as to the voluntariness of the statements. In 1964 the United States Supreme Court held that before a confession can be admitted into evidence, the trial judge must hold a hearing outside the presence of the jury and make a clear finding of voluntariness. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Since then this Court has consistently held that failure to make a definite ruling on voluntariness before admission requires either a remand for the trial court to make such a finding or reversal unless the admission of the evidence itself was harmless error. State v. Marovich, 109 Ariz. 45, 504 P.2d 1268 (1973). This rule applies here because for the purposes of compliance with Jackson v. Denno, *supra*, there is no difference between confessions and admissions. State v. Owen, *supra*.

We stated in Marovich, *supra*, in dictum that denial of a motion to suppress could be tantamount to a finding of voluntariness where it is clear the trial court understood Jackson v. Denno and merely worded the ruling badly. We believe such a situation occurred here. Under the circumstances of this case, it is clear that a finding of voluntariness underlies the trial court's ruling and therefore the lack of *such* a specific finding is not reversible error.

In this case the prosecutor told the trial court that he did not intend to use these statements in his case in chief, and so his only argument at the hearing was that the statements were voluntary and admissible for impeachment purposes. The United States Supreme Court rule described *supra* is that to be admitted for impeachment purposes statements which violated *Miranda* must pass traditional voluntariness and trustworthiness standards. In the context of this case, the trial court's decision to exclude the statements in question for purposes of the prosecution's case in chief but to admit them for impeachment purposes can be based only on an underlying decision that the statements violate *Miranda* but do not offend traditional standards of voluntariness. We hold the failure to make specific findings, although error, is not reversible error under the specific circumstances of this case.

In addition to the problem of the lack of a specific finding of voluntariness appellant urges this Court to find reversible error because the statements were not in fact voluntary. It is well settled that the trial court's determination of the admissibility of a defendant's statement will not be overturned unless clear and manifest error appears. *E.g.* State v. Edwards, 111 Ariz. 357, 529 P.2d 1174 (1975). We look to the totality of the circumstances to decide if the statements were properly admitted. State v. Miller, 110 Ariz. 597, 522 P.2d 23, *cert. denied*, 419 U.S. 1004, 95 S.Ct. 325, 42 L.Ed.2d 281 (1974). The evidence in this case is sufficient to support the determination of the trial court.

There was testimony that the nurse in the intensive care unit gave the police officer permission to interrogate appellant and that she was present during the interroga-

tion. She testified that she had not given appellant any medication and that appellant was alert and able to understand the officer's questions. She also testified that neither mental or physical force nor abuse was used on appellant. She said that appellant was in moderate pain but was very cooperative with everyone. The interrogating officer also testified that appellant did not appear to be under the influence of drugs and that appellant's answers were generally responsive to the questions.[3] The officer testified that he used no force or coercion, neither mental or physical. Nor were any promises made. On the basis of this testimony the admission of the statements for impeachment purposes was not an abuse of discretion.

Appellant also makes some arguments concerning whether the impeaching statements are sharply contradictory to his testimony. These arguments go to the weight and not the admissibility of the evidence.

For the foregoing reasons we uphold the trial court's determination of the admissibility for impeachment purposes of appellant's statements made while in the hospital.

Admission of Federal Firearms Form

Appellant argues that admission of the federal firearms form on which he falsely denied he was a heroin addict is improper and inadmissible impeachment by prior misconduct and is irrelevant as well. Appellant admits in his brief, however, that it would be admissible to show intent, citing State v. Schmid, 107 Ariz. 191, 484 P.2d 187 (1971). It would also be admissible, of course, to impeach appellant by a prior inconsistent statement. Both of these bases for admission apply here and the evidence is, therefore, relevant also.

One aspect of the prosecution's case was to attempt to show that appellant had been planning to shoot any police officer who might "hassle" him, thereby negating appellant's self-defense claim. Appellant testified that he thought he had purchased the pistol used in the shooting

[3] We might add at this point the fact that appellant was able to write his answers in a legible and fairly sensible fashion provides further support for the trial court's determination.

some three or four weeks prior to the time he had actually purchased it. The implication of that part of his testimony was that the gun had been purchased with no specific purpose. The firearm form was introduced to show that it had been purchased very shortly before the shooting. Cross-examination of appellant also brought out the fact that appellant felt he would be unable to purchase a gun legally unless he lied about being a heroin addict. It is clear that admission of the firearms form is relevant both to the intent issue and to contradict appellant as to date of purchase, and it was admitted for these purposes.

Appellant also argues that even if this evidence is admissible, it is so highly prejudicial that its admission is reversible error. State v. Little, 87 Ariz. 295, 350 P.2d 756 (1960). The evidence here, however, is not highly prejudicial. The jury already knew that appellant was a heroin addict because of his testimony. Evidence of falsification of a federal firearms form is not sufficiently prejudicial to render inadmissible evidence admissible on two other valid grounds. The admission of this evidence was proper.

Statements Made Two and One Half Months Earlier

Appellant challenges the admission of a witness' testimony concerning a conversation which occurred two and one half months prior to the shooting. The witness testified that appellant said he planned to buy a sawed-off shotgun in case anyone hassled him or in case the pigs hassled him. Appellant, citing Wigmore on Evidence, §§ 394-396, argues that this statement concerning his mental state is inadmissible because (1) it is not a threat against a specific class, (2) there is no showing of a continuing mental state until the time of the shooting, and (3) the shooting incident was not a manifestation of the statement.

The statement in question can reasonably be interpreted as a threat against a specific class: police. Appellant does not argue there is any ambiguity in the meaning of the

term "pigs". That people in general were also included does not take away from the specificity of "pigs".

It is well settled that remoteness in time does not control admissibility of such evidence but rather is a factor to be considered by the jury in determining the weight of the evidence. Sparks v. State, 19 Ariz. 455, 171 P. 1182 (1918); State v. Moore, 111 Ariz. 355, 529 P.2d 1172 (1974). It is impossible to set definitive guidelines as to the time limits for evidence of a continuing state of mind. In State v. Moore, *supra*, we upheld admission of two statements made eighteen months and one year prior to the incident at issue. The time period here is, of course, much less remote and admission of the statement was proper. It is within the jury's province to determine the weight of such evidence.

Similarly, so long as it is a reasonable inference, it is within the jury's province to decide if the shooting incident is a manifestation of the earlier statement. In this case one reasonable inference from the evidence is that the shooting was a manifestation of appellant's earlier statement. The fact that belief in appellant's defense theory would lead one to the opposite inference does not create reversible error or, indeed, any error at all.

Appellant raises some other points but they all go to the weight of the evidence and that is not an issue on appeal. We hold the admission of the prior statement proper.

A.R.S. § 13-1411

Appellant argues that the arrest was illegal due to noncompliance with A.R.S. § 3-1411 and therefore his motion to suppress all evidence should have been granted. A.R.S. § 13-1411 provides:

> "§ 13-1411. Right of officer to break into building.
>
> "An officer, in order to make an arrest either by virtue of a warrant, or when authorized to make such arrest for a felony without a warrant, as provided in § 13-1403, may break open a door or window of any building in which the person to be arrested is or is reasonably believed to be, if the officer is refused admittance after he has announced his authority and purpose."

There was sufficient evidence for the trial court to find that A.R.S. § 13-1411 had been complied with. One officer testified that he heard Officer Headricks say police or something like that when the door was first opened. There was also testimony that at least one other officer announced his authority during the time the officers were trying to push open the door after it had been almost shut. Under all the circumstances of this case there can be no doubt that the person answering the door, when told it was the police, also knew their purpose. If one is in the midst of a drug buy, when the buyer announces that he is a police officer, his purpose is hard to misconstrue.

Appellant also discusses Headricks' entry into appellant's bedroom. That entry is relevant to the self-defense issue but not to A.R.S. § 13-1411 which deals only with breaking into a building not with actions after entry.

We uphold the trial court's denial of the motion to suppress regarding A.R.S. § 13-1411.

Warrantless Search

Appellant argues that the warrantless search of his apartment was illegal in violation of the Fourth Amendment of the United States Constitution. He alleges—correctly—that there were not sufficient facts to fit within the usual "exigent circumstances" exception and that there was ample time to secure a warrant. Thus the issue is whether this Court will adhere to its previous rulings which hold the search of a murder scene under certain circumstances to be a valid exception to the constitutional warrant requirement. State v. Sample, 107 Ariz. 407, 489 P.2d 44 (1971);[4] State v. Superior Court, 110 Ariz. 281,

[4] The United States Court of Appeals for the Ninth Circuit disagreed, Sample v. Eyeman, 469 F.2d 819 (9th Cir. 1972). There are, however, a number of other jurisdictions with some sort of murder scene exception: e.g., Stevens v. State, 443 P.2d 600 (Alaska 1968), *cert. denied*, 393 U.S. 1039, 89 S.Ct. 662, —— L.Ed.2d —— (1969); People v. Wallace, 31 Cal.App.3d 865, 107 Cal. Rptr. 659 (1973); Patrick v. State, 227 A.2d 486 (Del. 1967); State v. Chapman, 250 A.2d 203 (Me. 1969); State v. Oakes, 276 A.2d 18 (Vt.), *cert. denied*, 404 U.S. 965, 92 S.Ct. 340, 30 L.Ed.2d 285 (1971); Longuest v. State, 495 P.2d 575 (Wyo.), *cert. denied*, 409 U.S. 1006,

517 P.2d 1277 (1974); State v. Duke, 110 Ariz. 320, 518 P.2d 570 (1974).

After reviewing this issue we are reaffirming our rule. We will set some guidelines, however, because we support the principle that "[s]earches conducted without a warrant issued upon probable cause are 'per se unreasonable * * * subject only to a few specifically established and well-delineated exceptions.' Schneckloth v. Bustamonte, 412 U.S. 218 at 219, 93 S. Ct. 2041, at 2043, 36 L.Ed.2d 854, at 858 (1973)." State v. Sardo, 112 Ariz. 509, 543 P.2d 1133 (1975). With the guidelines, *infra*, in this opinion, search of a murder scene is such a "specifically established and well-delineated exception."

We hold a reasonable, warrantless search of the scene of a homicide—or of a serious personal injury with likelihood of death where there is reason to suspect foul play—does not violate the Fourth Amendment to the United States Constitution where the law enforcement officers were legally on the premises in the first instance. We chose not to limit this warrant requirement exception only to actual murders because immediate action may be important to determining the circumstances of death and because a reasonable search should not later be invalidated because the intended murder victim may be saved by a medical miracle. For the search to be reasonable, the purpose must be limited to determining the circumstances of death and the scope must not exceed that purpose. The search must also begin within a reasonable period following the time when the officials first learn of the murder (or potential murder). Cf. State v. Duke, *supra*.

We find the search of appellant's apartment falls within the murder scene exception to the Fourth Amendment warrant requirement. Although Officer Headricks may not have been dead before the search began, it was reasonable to believe that death was likely and that a murder charge was a possibility. The search was aimed

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93 S.Ct. 438, 34 L.Ed.2d 299 (1972). *Contra*, People v. Williams, 557 P.2d 404 (Colo. 1976). The United States Supreme Court has not disapproved of any of these decisions.

at establishing the circumstances of death (bullet trajectories, e.g.) and included evidence relevant to motive and intent or knowledge (narcotics, e.g.). The search began when the investigative unit arrived, in accordance with Police Department procedures. For these reasons, the search was legal and the trial court's denial of appellant's motion to suppress was proper.

Severance of the Murder Count

Appellant argues it was prejudicial, reversible error for the trial court to deny his motion to sever the murder count from the other counts listed in the indictment. We find no error. So long as the determination is within the guidelines of Rule 13.3 for joinder and Rule 13.4 for severance, of the Rules of Criminal Procedure, 17 A.R.S., it is within the trial court's discretion to deny appellant's motion. *E.g.*, State v. Williams, 108 Ariz. 382, 499 P.2d 97 (1972); State v. Boggs, 108 Ariz. 425, 501 P.2d 9 (1972).

We find Rule 13.3(a)(2) controlling as to joinder in this situation:

> "Rule 13.3 Joinder
>
> "A. Offenses. Provided that each is stated in a separate count, 2 or more offenses may be joined in an indictment, information, or complaint, if they:
>
> • • • •
>
> "(2) are based on the same conduct or are otherwise connected together in their commission * * *."

The murder, assault with a deadly weapon, and drug charges were all part of a continuing series of events, and are "otherwise connected together in their commission." *Cf.* State v. Tynes, 95 Ariz. 251, 389 P.2d 125 1964).

Rule 13.4(a) provides the standard for severance:

> "Rule 13.4 Severance
>
> "A. In General. Whenever 2 or more offenses or 2 or more defendants have been joined for trial, and

> severance of any or all offenses, or of any or all defendants, or both, is necessary to promote a fair determination of the guilt or innocence of any defendant of any offense, the court may on its own initiative, and shall on motion of a party, order such severance.
>
> * * * *

This Court will reverse the denial of a motion to sever only when a clear abuse of discretion is shown. State v. Dale, 113 Ariz. 212, 550 P.2d 83 (1976).

No such abuse of discretion, i.e. prejudice, can be shown here because the evidence as to the other counts would have been admissible at the murder trial even if severance had been granted. The evidence would be admissible on two bases: as relevant to the issue of intent and as part of the complete picture. State v. Schmid, *supra*; State v. Villavicencio, 95 Ariz. 199, 388 P.2d 245 (1964).

Since we find no prejudice, we hold the denial of the motion to sever was proper.

Prosecutor's Closing Argument

Appellant points to a single statement in the prosecutor's closing argument and argues that it is so inflammatory and prejudicial as to deprive him of a fair trial:

> "Don't tell every heroin pusher in town that he can have a gun; that he can have it loaded; that he can shoot a pig if he feels hassled and that all he need do, is take the witness stand and say, 'Yes, sir; no sir,' and claim that he had no idea that he was shooting a cop."

The rule in Arizona is that counsel may draw reasonable inferences from and appraise evidence which was adduced at trial. State v. King, 110 Ariz. 36, 514 P.2d 1032 (1973).

The statement in question is based on the evidence. There was testimony that appellant was a heroin dealer, that he had a loaded gun, that he shot a police officer, and his defense was that he had no idea that he was

shooting a police officer. It is a reasonable inference, if the evidence pointing to appellant's guilt is believed, that acquitting appellant might indicate to other heroin sellers that they could get away with the same thing.

The problem with the prosecutor's statement is that it is an emotional appeal to the jury's fears. Although in closing argument both counsel have wide latitude, State v. Landrum, 112 Ariz. 555, 544 P.2d 664 (1976), such an appeal to fear is improper. *Cf.* State v. Makal, 104 Ariz. 476, 455 P.2d 450 (1969); State v. Huson, 73 Wa.2d 660, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096, 89 S.Ct. 886, —— L.Ed.2d —— (1969). We need not determine, however, whether it was so prejudicial as to require reversal because we are reversing on other grounds, *supra*. If the murder and assault charges are retried on remand, we urge counsel to refrain from appeals to juror's fears.

Conclusion

For the foregoing reasons, the judgment of the trial court as to Counts I (murder, first degree) and II (assault with a deadly weapon) is reversed and remanded for proceedings consistent with this opinion. The judgment of the trial court as to Counts III, IV and V (unlawful sale of narcotics, unlawful possession of narcotic drug for sale and unlawful possession of narcotic drug, respectively) is affirmed. Because the sentence for Count III was to run consecutively to that of Count I (IV and V are concurrent with III) we are remanding on Counts III, IV and V for resentencing.

FRANK X. GORDON, JR.
Justice

CONCURRING:

JAMES DUKE CAMERON
Chief Justice

FRED C. STRUCKMEYER, JR.
Vice Chief Justice

HAYS, specially concurring.

I concur with the majority in all respects except that I take exception to the characterization of the county attorney's statement in argument as being "an emotional appeal to the jury's fears." If oral argument at the close of the case is to have any purpose, it must be more than a dull and sterile discussion of the evidence. The condemned statement is based on the evidence and the inference drawn therefrom is reasonable. It does not deprive the defendant of legitimate defenses nor does it exceed the bounds of propriety.

JACK D. H. HAYS
Justice

I concur.

WILLIAM A. HOLOHAN
Justice

IN THE SUPREME COURT OF THE
STATE OF ARIZONA

No. 3283

[Title Omitted in Printing]

MOTION FOR REHEARING

RUFUS JUNIOR MINCEY, the appellant herein, by and through the undersigned attorneys, hereby moves, pursuant to Rule 31.18, Ariz. R. Crim. P., for a rehearing of this Court's decision filed May 11, 1977 on the grounds and for the reasons expressed in the attached Memorandum, incorporated by reference herein.

RESPECTFULLY SUBMITTED this 12th day of June, 1977.

LAW OFFICES OF KLEIN & KLEIN

By /s/ Frederick S. Klein
FREDERICK S. KLEIN

BOLDING, OSERAN & ZAVALA

By /s/ Charles E. Giddings
for RICHARD S. OSERAN

MEMORANDUM

Appellant continues to rely on all positions and arguments previously made herein in his briefs and argument and nothing in this memorandum should be considered an abandonment thereof.

I.

THIS COURT ERRED IN UPHOLDING THE TRIAL COURT'S DETERMINATION OF THE ADMISSIBILITY FOR IMPEACHMENT PURPOSES OF APPELLANT'S RESPONSES TO POLICE QUESTIONING WHILE IN THE HOSPITAL'S INTENSIVE CARE UNIT.

The use of appellant's responses to police questioning while in the hospital's intensive care unit for impeachment purposes was reversible error and violated Appellant's right to due process of law and his privilege against self incrimination under the Fourteenth and Fifth Amendments to the Constitution of the United States. The responses involved were determined to have been obtained in violation of the requirements of *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1964). This Court relies upon a limited exception to the Constitutional exclusionary rule of *Miranda* to sustain the admissibility for impeachment purposes of appellant's responses. The exception involved was stated in *Harris* v. *New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971), and reiterated in *Oregon* v. *Haas*, 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975). For statements to come within the *Harris* exception, they must be (1) inconsistent with a defendant's testimony at trial bearing directly on the crimes charged and (2) must have been obtained under circumstances assuring their trustworthiness and voluntariness.

This Court has erroneously overlooked the first requirement of the *Harris* test and treated the lack of inconsistency as merely going to "the weight and not the admissibility of the evidence." Opinion at 17. The ra-

tionale for permitting an exception to the *Miranda* exclusionary rule is that the shield provided by *Miranda* should not be perverted into a license to testify inconsistently or perjuriously. That rationale becomes meaningless if the statements introduced to impeach are not in fact inconsistent. Furthermore, as the United States Supreme Court has recognized, it is basic to the law of evidence that before a prior statement can be used to impeach by inconsistency, the statement must indeed be inconsistent. *United States* v. *Hale*, 422 U.S. 171, 95 S. Ct. 2133, 45 L. Ed. 2d 99 (1975). And a witness must be given full opportunity to clarify his statement before impeachment testimony may be admitted. *The Charles Morgan*, 115 U.S. 69, 5 S. Ct. 1172, 29 L. Ed. 316 (1885).

The responses used for impeachment were not inconsistent with appellant's testimony at trial. Appellant testified that he had seen a gun in Officer Headricks' hand when Headricks entered the bedroom. As impeachment, appellee offered a statement made in response to a question which asked, did "this guy" who came into the bedroom have a gun? The response had been, "I can't say for sure. Maybe he had a gun," and appellant indicated that he hadn't been sure whether by "this guy" the interrogator had meant Headricks or the officer who found him after he'd been shot, or what. Appellant also testified that at the time Officer Headricks entered the bedroom with his drawn gun, appellant had no idea the entry was for purposes of making an arrest. Appellant offered a statement made in response to a question regarding what appellant had meant when he wrote down that all hell had broken lose. Appellant's response, given at a time when he had already been informed that he was under arrest and being charged with the murder of a police officer, was that he meant when the "bust" took place. That response simply indicated that several hours after Headricks entered his bedroom, and after appellant had been made aware that Headricks and his companions were police officers, and after appellant had been advised that he was under arrest and was being charged with murder, appellant knew that the commotion had resulted from a police "bust"; it did not indicate what appellant's knowledge or state of mind was at the time of the break-in.

This Court's analysis of the circumstances of appellant's arrest appears to concentrate on whether appellant was mentally competent to give statements. Of course, if appellant was not mentally competent at the time, he couldn't give a voluntary statement regardless of mental or physical pressure. But that is not the end of a voluntariness inquiry. Even if appellant was mentally competent, his responses to interrogation were involuntary and inadmissible as evidence if appellant's will had been overborne so that the statements were not his free and voluntary act. *E.g.*, *Sims* v. *Georgia*, 389 U.S. 404, 88 S. Ct. 523, 19 L. Ed. 2d 634 (1967); *Davis* v. *North Carolina*, 384 U.S. 737, 86 S. Ct. 1761, 16 L. Ed. 2d 895 (1966); *Haynes* v. *Washington*, 373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963); *Townsend* v. *Sain*, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963); *Colombe* v. *Connecticut*, 367 U.S. 568, 81 S. Ct. 1860, 6 L Ed. 2d 1037 (1961); *Payne* v. *Arkansas*, 356 U.S. 560, 78 S. Ct. 844, 2 L. Ed. 2d 975 (1958); *Fikes* v. *Alabama*, 352 U.S. 191, 77 S. Ct. 553, 1 L. Ed. 2d 246 (1957); *Gallegos* v. *Nebraska*, 342 U.S. 55, 72 S. Ct. 141, 96 L. Ed. 86 (1951); *Haley* v. *Ohio*, 332 U.S. 596, 68 S. Ct. 302, 92 L. Ed. 224 (1948); *Ashcraft* v. *Tennessee*, 327 U.S. 274, 66 S. Ct. 544, 90 L. Ed. 667 (1946), *connected case*, 322 U.S. 143, 64 S. Ct. 921, 88 L. Ed. 1192 (1944); *Ward* v. *Texas*, 316 U.S. 547, 62 S. Ct. 1139, 86 L. Ed. 1663 (1942); *Chambers* v. *Florida*, 309 U.S. 227, 60 S. Ct. 472, 84 L. Ed. 716 (1940).

Whether there was any mental coercion used upon Appellant is a question for this Court and not Nurse Graham or the interrogating officer to decide. It is undisputed that Appellant at times during the interrogation looked exhausted, that Appellant had not slept for some time, that Appellant indicated he did not want to answer questions, that Appellant asked for and did not receive the assistance of counsel, that Appellant had little previous experience with the police, that Appellant could not speak, that Appellant was only about four hours out

of surgery, that Appellant was being fed intravenously, given oxygen by an oral tracheal tube, had a tube from his nose to his stomach to prevent him from aspirating vomit, was catheterized, that Appellant repeatedly indicated he was in pain and that his pain was unbearable, that at least twice Appellant lapsed into unconsciousness, that the only persons who had access to Appellant were the police and hospital personnel, that Appellant repeatedly expressed uncertainty as to his ability to accurately recall the facts, that the police refused to comply with Appellant's requests to break off questioning, and that Nurse Graham, instead of coming to Appellant's aid, encouraged him to give statements to the police. Appellant was helpless. He could not walk away from the police officer or even turn his back on him. He could not even speak to tell him to leave. He could only communicate by laborious writing. He was in pain, weak and confused. He asked to be left alone, but no one complied and no one came to his aid, not even the one person he should have been able to turn to, his nurse. Through it all, there was relentless questioning. Appellant must have known he would not be left alone until the officer obtained the statements he was seeking. Clearly, his will was overborne. Such cannot be considered circumstances assuring the voluntariness of his statements. It should be pointed out that all we can be sure of are Appellant's protestations and statements, since they were written out. There are no equally accurate records of what questions were asked or what conditions existed around Appellant. Nurse Graham's assertion that Appellant was in moderate pain is gratuitous and insubstantial since she could not know what degree of pain another person was experiencing and since what would be moderate pain to one accustomed to the sight of pained persons in a hospital may be excruciating to a person experiencing for the first time the deep pain of large caliber gunshot wounds.

II.

THIS COURT ERRED IN UPHOLDING THE ADMISSIBILITY OF EVIDENCE OBTAINED AS THE FRUIT OF THE WARRANTLESS SEARCH OF APPELLANT'S APARTMENT.

The court committed reversible error and violated the Fourth and Fourteenth Amendments to the Constitution of the United States when it denied Appellant's motion to suppress all the evidence seized in the warrantless search of Appellant's apartment.

> "The most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment —subject only to a few specifically established and well delineated exceptions.' *Katz* v. *United States*, 389 U.S. 347 at 357. The exceptions are 'jealously and carefully drawn', *Jones* v. *United States*, 357 U.S. 493 at 499, and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.' *McDonald* v. *United States*, 335 U.S. 451 and 456. '[T]he burden is on those seeking the exemption to show the need for it.'" *Collidge* v. *New Hampshire*, 403 U.S. 443, at 455, 29 L.Ed.2d 564, 91 S.Ct. 2022, (1971), *United States* v. *Soriano*, (5th Cir.) 482 F.2d 469 at 472 (1973).

The United States Supreme Court has not yet sanctioned an exception for murder or serious injury scenes. And as this Court is aware, the United States Court of Appeals for the Ninth Circuit has expressly rejected such an exception. *Sample* v. *Eyeman*, 469 F.2d 819 (9th Cir. 1972). But assuming arguendo that there is such a Constitutional exception, this case does not fall within it. In every one of the cases cited by this Court in its opinion as support for a murder scene exception, the police entered upon the scene to render emergency aid, often entering by consent, and in each

case the scope of search was limited. In the case at hand, the police entered the premises to make an arrest and this attempt precipitated the resultant injuries. In the case at hand, every item in the apartment was examined and inventoried over a four day period.

The first distinction is important because the asserted exception has evolved first and foremost as a justification for police to come without hesitation onto the scene of severe injuries, or potential injury, to render aid. Often in these cases, once justification is given for police coming onto the scene, there is no search, the items seized then being in plain view. The search in this case was completely unrelated to any need for rendering aid, and occurred long after the injured persons were removed from the premises. The instrumentalities of injury, the pistol shots, were known in this case before any search began and there was no need for treatment purposes to know more about the instrumentalities, as, for example, there might have been in a poisoning case.

The second distinction is important in that courts adopting a murder scene exception have sought to avoid turning this exception into a wholesale license to make warrantless searches in cases of crime involving bodily injury or death. This Court in fact states that the scope of search must not exceed the purpose of determining the circumstances of death (Opinion at 23); yet in this case, the search included inventoring the entire contents of the apartment (transcript of Suppression Hearing of February 3 and 4, 1975 at pp. 141-142) over a four day period. It must be conceded, since the premises in this case were secured prior to search and since the search extended over a four day period, that there were no circumstances which prevented the police from seeking a search warrant or necessitated an immediate search.

If this case falls within Arizona's conception of a murder scene exception, then there is no exception, only a license to evade the Fourth Amendment's search warrant requirement in cases of bodily injury. And worse, this decision will stand as encouragement to police to engage in reckless gunplay and violence. The warrant requirement is soundly based in a policy that intrusive searches should generally only be permitted where an independent magistrate, not the person conducting the search, has determined from facts known prior to a search, and not reconstructed with the benefit of hindsight, that the search is reasonable. This policy should not be lightly discarded. The formulation of a murder scene exception indicated in this Court's May 11, 1977 opinion does not rest upon exigent circumstances. It promotes searches based upon the searcher's perception of what is "a serious personal injury" and of whether "there is reason to suspect foul play," not a magistrate's; and it licenses virtually unlimited searches. Apparently all this is rationalized by an assumption that cases involving bodily injury are more serious than other cases and require less attention to the protection of individual rights. But how can one subjectively say that bodily injury cases are more serious breaches of societal law and security than rape, espionage, treason, extortion, robbery, counterfeiting, burglary, etc. And if warrantless searches are to be justified because of the seriousness of one class of crimes, why not for other classes?

III.

THIS COURT ERRED IN UPHOLDING THE ADMISSION IN EVIDENCE OF A FEDERAL FIREARMS FORM ON WHICH APPELLANT HAD DENIED BEING A HEROIN ADDICT.

Admission of the firearms form in question in this case was completely unjustified by the law of evidence and denied Appellant due process of law under the Fourteenth Amendment of the Constitution of the United States. This Court claims the form could have been admitted to impeach Appellant's testimony as to the date of purchase of his gun. However, extrinsic evidence cannot be used to impeach upon a collateral matter. *State* v. *Williams*, 111 Ariz. 511, 533 P.2d 1146 (1975); *State* v. *Little*, 87 Ariz. 295, 308, 350 P.2d 756, 764 (1960); *Crowell* v. *State*, 15 Ariz. 66, 76, 136 P. 279,

283 (1913). Regardless of whether the gun was purchased three weeks before or six days before Officer Headricks' death, it is undisputed that Appellant did not know Headricks at the time of purchase. The date of purchase was either irrelevant or collateral to the issue being tried, Appellant's mens rea. Further, a witness cannot be impeached by extrinsic evidence unless he has first been given opportunity to explain or deny the alleged inconsistent statement. *Kerley Chemical Corp.* v. *Producers Cotton Oil Co.*, 2 Ariz. App. 56, 57-58, 406 P.2d 258, 259-60 (1965). No such opportunity was given Appellant.

Alternatively, this Court claims the form would have been admissible to show intent. Yet it is undisputed that at the time the firearms form was completed, Appellant had not met Officer Headricks and none of the events leading to his death had yet occurred. How then does the date of purchase have any probative relation to Appellant's intent at the time Officer Headricks was shot? The prejudicial impact of this evidence of a prior federal crime, which labeled Appellant as a liar, a criminal and a bad person, far outweighed any probative value the form had. *Compare*, *Manning* v. *Rose*, 507 F.2d 889, 894-95 (6th Cir. 1974); *Brown* v. *Parratt*, 406 F.Supp. 1357, 1361 (D. Neb. 1975); *Dorsey* v. *State*, 25 Ariz. 139, 213 P. 1011 (1923).

IV.

THIS COURT ERRED IN UPHOLDING THE LAWFULNESS OF THE FORCED ENTRY ON THIS CASE.

The officers entry into Appellant's apartment was unlawful, violating A.R.S. § 13-1411 and Constitutional rights of privacy protected by the Fourth, Due Process Clause of the Fourteenth, Ninth Amendments and the penumbra of the First, Third, Fourth, Fifth and Ninth Amendments to the Constitution of the United States. The requirement that forced police entries must be preceded by an announcement of authority and purpose has a long history in our law, e.g., *In re Semayne's Case*,

77 Eng.Rep. 194 (K.B. 1603), and receives Constitutional protection. *See Ker* v. *California*, 374 U.S. 23, 87 S.Ct. 1623, 10 L.Ed.2d 726 (1963); *Meyer* v. *United States*, 386 F.2d 715 (9th Cir. 1967). *Cf.*, *Miller* v. *United States*, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958); *State* v. *Mendosa*, 104 Ariz. 395, 454 P.2d 140 (1969).

In justifying the entry in the instant case, this Court's opinion relies exclusively on the testimony of Officer Schwartz. Officer Schwartz, who said he had been standing at arm's length from Officer Headricks, claimed Headricks said something about police, but couldn't say for sure what Headricks had said because "Barry always did talk kind of low." Schwartz also testified in less than credible fashion that after Headricks had entered the apartment, Schwartz himself "said something, the more I think about it, the more, through experience, I hollered I was a police officer, 'open the door'. . . ." Yet witness Carol Greenwalt who was sitting inside the apartment only a few feet from the doorway testified that she never heard any of the officers identify themselves as police officers and it is undisputed that the officers had dressed in plain clothes and Headricks, in particular, with his mustache, longish hair, flower print shirt, cowboy boots, levis and levi jacket sought to disguise his identity as a police officer. This Court concludes that an announcement of purpose was unnecessary since "in the midst of a drug buy, when the buyer announces that he is a police officer, his purpose is hard to misconstrue." That conclusion, however, assumes that if the police announced themselves as police, they did so in a manner that could be heard by the apartment occupants, an assumption not warranted by the evidence. Under the circumstances, the person at the door might just as well have assumed that those seeking entry with drawn guns were intent upon a drug rip-off or other illegal endeavor. Prophetically, it was said in *State* v. *Valenzuela*, 3 Ariz. App. 278, 280, 413 P.2d 788, 790 (1966):

> "We shudder to think of the consequences had the defendant, not hearing the officers identify them-

selves, or having no reason to believe they were officers, decided to protect his home . . . with a shotgun."

V.

THIS COURT ERRED IN UPHOLDING THE DENIAL OF APPELLANT'S MOTION TO SEVER AND IN NOT EXPRESSLY FINDING THE PROSECUTOR'S INFLAMMATORY CLOSING ARGUMENT TO HAVE CONSTITUTED REVERSIBLE ERROR.

It was reversible error and a violation of Appellant's right to a fair trial under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States to deny Appellant's Motion for severance of the murder charge from the other charges upon which he was indicted. This Court concludes that Appellant was not prejudiced by the denial of severance. As examples of the prejudice done in this case, one can point to the injection of the unusual and inflamatory allegation of killing a Tucson police officer into the consideration of the other counts, *cf. State* v. *Williams*, 108 Ariz. 382, 386, 499 P.2d 97, 101 (1972), or the undue limitation on the Appellant's right to testify in his own behalf and the strong likelihood that his testifying with regard to the murder count while remaining silent on other counts would result in improper inferences of guilt being drawn. *See* A.B.A. Standards Relating to Joinder and Severance, page 31.

A further prejudice results from this Court's disposition of the matter of the prosecutor's inflamatory closing argument. The Court recognizes that the argument constituted an improper appeal to the jury's fears and was prejudicial, but avoids deciding that it was reversible error because the murder and assault convictions have been reversed. The prosecutor's argument was an invitation to the jury to ignore the law and evidence presented and render a judgment of punishment based upon fear and emotion. Since all counts were tried together, the inflamatory invitation to punish existed for all counts. This Court cannot conclude beyond a reasonable doubt

that an appeal to punish without regard to the law and evidence of the case was confined in its prejudicial impact to only two of the five counts tried together. *Compare Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

VI.

THIS COURT ERRED IN UPHOLDING THE ADMISSION OF APPELLANT'S ALLEGED CONVERSATIONS MADE TWO AND A HALF MONTHS PRIOR TO THE SHOOTING INCIDENT.

It was reversible error and a violation of Appellant's right to a fair trial under the Due Process Clause of the Fourteenth Amendment to the United States Constitution to permit the prosecution to impeach Appellant's testimony with a conversation allegedly had with Anthony Acosta. The conversation was said to have been made regarding the possible use of a shotgun brought by Appellant to Acosta's machine shop. This Court's opinion completely ignores the requirement that a continuing mental state be shown from the time of the statement to the time of the shooting. While the Court refers to statements made eighteen months and a year prior to the incident at issue permitted in *State* v. *Moore*, 111 Ariz. 355, 529 P.2d 1172 (1974), it neglects to note that in that case a similar statement was made a month before the incident, evidencing a continuing mental state. on the contrary, in this case Acosta testified that Appellant sold the gun under discussion a couple of days after the conversation and that Appellant did not express an apprehensive attitude toward authority. *See State* v. *Willits*, 2 Ariz. App. 443, 445, 409 P.2d 727, 729 (1966). The admission of this alleged conversation, in addition to being improper in its own right, prejudiced Appellant by permitting the inference that the trial court concluded that Appellant knew Headricks to be a police officer at the time of the shooting.

CONCLUSION

For all the foregoing reasons and those previously expressed, Appellant urges this Court to grant rehearing.

[Certificate of Service Omitted in Printing]

IN THE SUPREME COURT
STATE OF ARIZONA

No. 3283

[Title Omitted in Printing]

RESPONSE TO MOTION FOR REHEARING

COMES NOW the State, by and through BRUCE E. BABBITT, the Attorney General, and PHILIP G. URRY, Assistant Attorney General, and submits the attached Memorandum of Points and Authorities in response to Appellant's Motion for Rehearing.

Respectfully submitted this 21st day of June, 1977.

BRUCE E. BABBITT
The Attorney General

/s/ Philip G. Urry
PHILIP G. URRY
Assistant Attorney General
1005 Pioneer Plaza Building
100 North Stone Avenue
Tucson, Arizona 85701
Attorney for Appellee

[Certificate of Service Omitted in Printing]

MEMORANDUM OF POINTS AND AUTHORITIES

I

Appellant contends in support of rehearing that this Court's opinion failed to consider the requirement of *Harris* v. *New York*, 401 US 222, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971) that a statement given in violation of *Miranda* v. *Arizona*, 384 US 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1964) must be "inconsistent with a defendant's testimony at trial bearing directly on the crimes charged" before it may be introduced for impeachment purposes. Appellant's Memorandum at 2. It is apparent that Appellant views this inconsistency requirement as mandating that the statements amount almost to a flat contradiction of the defendant's direct testimony. His contention is wrong for two reasons. First, neither *Harris* nor *Oregon* v. *Hass*, 420 US 714, 95 S.Ct. 1215, 43 L.Ed. 2d 570 (1975) established a *constitutional* requirement that the prior statements contradict the defendant's direct testimony, or even "contrast sharply" with it, as Appellant argued in his Opening and Reply Briefs. The *Harris* opinion's references to the sharply contrasting nature of the prior statements was merely descriptive. Further, the statement before the Court in *Oregon* v. *Hass*, *supra*, were inconsistent with the defendant's direct testimony, but could hardly be said to have contrasted sharply with it. In any event, it is clear from both *Harris* and *Oregon* v. *Hass* that the degree of inconsistency or contradiction is by no means crucial to the application of the *Harris* rule.

Appellant's contention is also erroneous because Appellant's prior statements were in fact inconsistent with his direct testimony. It is true that Appellant attempted to explain the inconsistencies from the witness stand. But neither the jury nor this Court was bound to accept those explanations.

Appellant also errs in asserting in essence that this Court failed to pursue the voluntariness inquiry beyond the question of whether Appellant was mentally competent. As this Court noted pursuant to *State* v. *Edwards*, 111 Ariz. 357, 529 P.2d 1174 (1975), the trial court's finding is not to be overturned in the absence of clear and manifest error. This Court properly found that no such error was committed in the instant case. As the Court noted in its opinion, Nurse Graham was present in the intensive care unit while Appellant was being questioned. She testified that Appellant was not under medication and was alert and able to understand the questioning. She also testified that the officer did not apply mental or physical coercion to Appellant. The interrogating officer substantially confirmed the nurse's testimony, and added that no promises were made. Although Appellant offers speculation concerning Appellant's subjective mental processes at the time of the questioning, he has presented nothing that would indicate clear and manifest error. This Court correctly upheld the trial court's ruling.

II

This Court's opinion rejected Appellant's contention that the search of his apartment violated the Fourth Amendment. The Court stated:

> "We hold a reasonable, warrantless search of the crime scene of a homicide—or of a serious personal injury with likelihood of death where there is reason to suspect foul play—does not violate the Fourth Amendment to the United States Constitution where the law enforcement officers were legally on the premises in the first instance. We chose not to limit this warrant requirement exception only to actual murders because immediate action may be important to determining the circumstances of death and because a reasonable search should not later be invalidated because the intended murder victim may be saved by a medical miracle. For the search to be reasonable, the purpose must be limited to determining the circumstances of death and the scope must not exceed that purpose. The search must also begin within a reasonable period following the time when the officials first learn of the murder (or potential murder)." Slip Opinion at 23.

Appellant now contends that the search in the instant case was not in fact within the murder scene exception to the warrant requirement. His contention is wrong. The murder scene exception is not conceptually dependent upon an initial entry by the police to render emergency aid; a legal entry is all that is needed. *See Stevens* v. *State*, 443 P.2d 600 (Alaska 1968). Here the entry was made to effect a lawful arrest. Further, it is clear from *State* v. *Superior Court*, 110 Ariz. 281, 517 P.2d 1277 (1974) that the scope of the search is not limited by the purpose to render emergency aid. In *State* v. *Superior Court* the court stated:

> "Where the police are called to the scene of a homicide, they may lawfully investigate such portions of the premises as are *reasonably necessary to establish the true facts of the homicide*." 110 Ariz. at 281. (Emphasis added.)

Referring to *Stevens*, *supra*, the court in *State* v. *Chapman*, 250 A.2d 203 (Maine 1969) stated:

> ". . . we find persuasive the Court's views as to the right and obligation of the police to make a thorough investigation of premises on which a violent death has occurred, even to the extent of securing the aid of trained and experienced investigators. We note especially the view expressed that the police, by keeping control of the death scene, do not lose the benefit of their initial lawful entry." 250 A.2d at 208.

The *Chapman* court stated the rationale for the murder scene exception as follows:

> "There is no more serious offense than unlawful homicide. The interest of society in securing a determination as to whether a human life has been taken, and if so by whom and by what method, is great indeed and may in appropriate circumstances rise above the interest of the individual in being protected from governmental intrusion upon his privacy." 250 A2d at 210.

The scope of the search in the instant case was properly limited to determining the circumstances of Officer Headrick's death. The length of time consumed indicated thoroughness rather than overbreadth of scope. This Court properly sustained the search under the murder scene exception.

Appellant predicts the Court's decision "will stand as encouragement to police to engage in reckless gunplay and violence." Motion for Rehearing at 8. Appellant's fears are exaggerated. It is unlikely that police will undertake to create situations in which people are killed merely to take advantage of the opportunity to make warrantless searches of the resulting murder scenes.

III

Appellant contends that the federal firearms form was improperly introduced into evidence. His arguments on this point are substantially similar to those he raised in the briefs. The State will therefore stand on its Answering Brief as to this issue, and will offer no further argument.

IV

Appellant also contends this Court erred in holding that the arresting officers complied with A.R.S. § 13-1411. His attack on this holding is based upon Officer Schwartz' alleged lack of credibility and Appellant's assessment of the proper weight to be given to the testimony of Carol Greenwalt. It is also based upon speculation that at the time of the entry Officer Headricks still sought to disguise his identity. Appellant's contention that Officer Headricks did not announce his identity is substantially undercut by the fact that immediately after he entered the apartment the occupants attempted to bar the remaining officers by force. In any event, questions concerning the weight of the evidence are not appropriately raised in a motion for rehearing. The trial court's finding of compliance with A.R.S. § 13-1411 was supported by substantial evidence, and this Court properly sustained it.

V and VI

The contentions raised by Appellant in Arguments V and VI are substantially the same as those he raised earlier in his Opening and Reply Briefs. As to those arguments, the State will stand on its Answering Brief and will not present further argument. This Court correctly resolved such arguments against Appellant.

CONCLUSION

For the foregoing reasons the State respectfully urges this Court to deny rehearing.

Respectfully submitted this 21st day of June, 1977.

BRUCE E. BABBITT
The Attorney General

/s/ Philip G. Urry
PHILIP G. URRY
Assistant Attorney General
1005 Pioneer Plaza Building
100 North Stone
Tucson, Arizona 85701
Attorney for Appellee

[Certificate of Service Omitted in Printing]

SUPREME COURT
STATE OF ARIZONA
PHOENIX

85007

Supreme Court No. 3283

Pima County No. 26666

June 29, 1977

STATE OF ARIZONA, APPELLEE

vs.

RUFUS JUNIOR MINCEY, APPELLANT

The following action was taken by the Supreme Court of the State of Arizona on June 28, 1977 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing (Attorney General)—DENIED.

FURTHER ORDERED: Motion for Rehearing (Appellant)—DENIED."

Copy of Order Affirming in Part and Reversing and Remanding in Part enclosed.

CLIFFORD H. WARD
Clerk

By /s/ Mary Ann Hopkins
Deputy Clerk

TO: Hon. Bruce E. Babbitt, Attorney General, 159 Capitol Building, Phoenix, Arizona 85007

Heather A. Sigworth, Assistant Attorney General, 100 North Stone, Suit 1005, Tucson, Arizona 85701

Stephen D. Neely, Pima County Attorney, 111 West Congress, Tucson, Arizona 85701

Richard S. Oseran, Esq., Bolding, Oseran & Zavala, P.O. Box 70, La Placita Village, Tucson, Arizona 85702

Frederick S. Klein, Esq., Klein & Klein, 100 North Stone, Suite 306, Tucson, Arizona 85701

Rufus Junior Mincey, Arizona State Prison, Box B-34490, Florence, Arizona 85232

dkb

IN THE SUPREME COURT OF THE
STATE OF ARIZONA

No. 3283

STATE OF ARIZONA, APPELLEE

vs.

RUFUS JUNIOR MINCEY, APPELLANT

ORDER AFFIRMING IN PART AND REVERSING
AND REMANDING IN PART

Appeal from the Superior Court of Pima County

Number 26666

Honorable Mary Anne Richey, Judge

Bruce E. Babbitt, The Attorney General
by Heather A. Sigworth, Assistant Attorney General
Attorneys for Appellee

Rabinovitz, Minker & Dix, P.C.
by Albert Perry Dover
Bolding, Oseran & Zavala
by Richard S. Oseran
Attorneys for Appellant

This cause having been heretofore submitted, and the Court having duly considered same, and being now advised in the premises, files its Opinion. It is accordingly

ORDERED that the judgment of the trial court as to Counts I (murder, first degree) and II (assault with a deadly weapon) is reversed and remanded for proceedings consistent with this opinion; the judgment of the trial court as to Counts III, IV and V (unlawful sale of narcotics, unlawful possession of narcotic drug for sale and unlawful possession of narcotic drug, respectively) is affirmed; because the sentence for Count III was to run consecutively to that of Count I (IV and V were concurrent with III) we are remanding on Counts III, IV and V for resentencing, to comply with the Opinion of this Court, attached hereto.

DONE IN OPEN COURT this 11th day of May, 1977.

STATE OF ARIZONA
SUPREME COURT

I, CLIFFORD H. WARD, Clerk of the Supreme Court of the State of Arizona, hereby certify the above to be a full and true copy of the Order Affirming in Part and Reversing and Remanding in Part, made and entered in the above entitled cause by said Court on the 11th day of May, 1977.

IN WITNESS WHEREOF, I hereunto my hand and affix the official seal of said Court this 29th day of June, 1977.
CLIFFORD H. WARD
Clerk

By /s/ Mary Ann Hopkins
Chief Deputy Clerk

cc: Hon. Bruce E. Babbitt, Attorney General; Heather A. Sigworth, Assistant Attorney General, Tucson; Stephen D. Neely, Pima County Attorney; Hon. Harry Gin, Presiding Judge of Pima County; Department of Corrections; Superintendent of Arizona State Prison; Richard S. Oseran, Esq.; Frederick S. Klein, Esq.; Rufus C. Mincey; Edna Blank, Court Administrator for Pima County.

SUPREME COURT OF THE UNITED STATES

No. 77-5353

RUFUS JUNIOR MINCEY, PETITIONER

v.

ARIZONA

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Arizona.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 17, 1977

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 25195 103

77-5353

-1-

A 58 Today

Elizabeth B. Okoham RN
2010 10/28/74 SdCU
Arizona ~~Tucson~~ Medical Center

Ph 7.44
36
102
95.3
24.2 40%

Case No. A-26666
PLAINTIFF'S EXHIBIT NO.
Date
Adm.
DEFENDANT'S EXHIBIT NO.
Date
Adm.
Frances E. Gibbons, Clerk
By
Deputy

3283

ENTER 1. Date & Time 2. Problem Name & No. | S - Subjective A - Assessment | O - Objective P - Plan

L. Husr 10-24-74
2015

1

-2-

UNIVERSITY OF ARIZONA
ARIZONA MEDICAL CENTER
UNIVERSITY HOSPITAL

PROGRESS NOTES

ENTER 1. Date & Time 2. Problem Name & No.	S = Subjective A = Assessment O = Objective P = Plan

2

Frank C. Schaaf 10-28-74 2100
Nurse Coordinator Surgery
University Hospital 20:15

S - Subjective O - Objective
A - Assessment P - Plan

I was present during this interview. Ella St. Jane all voluntary. Elizabeth B. Gaffan RN University Hospital 10-28-74 2100

I KNEW him for 2 Days
Dud with BEARD
Chuck
fAIR HE has A Ride at the fair in south Toud

Every body know every body

I Remember some body standing over me saying move Nigger move I was in the floor beside the bed
[illegible] This is all I can say without A Lawyer.

[illegible]

I'm going to have to put my head together. There are so many things that I don't remember. I. Like how did they get in to the Apt.

How did [illegible]

Police

Do you me Did he give me some money (no)
What do you call A samphe [illegible]
I can't say without A Lawyer

Let me get my self together first. You see I'm not for sure every thing happened so fast. I can't answer. at this time because I don't think so. But I can't say for sure.
Some questions aren't clear to me at the present time. This writing was used a means of

L TO [illegible]

3

Nurse Coordinator, Surgery
University Hosp. 2100 10-28-74
3.

I was present during this interview - The St. Jane [illegible] Elizabeth B. Gaffan RN 10-28-74 2100

talking because I could not TALK at the time of the interview.

If Its possible to get a Lawer now. we can finish the talk. He could direct me in the Right Direction where as without a Lawyer I might SAW something thinking that it means something else. is it still inside me [illegible]
My Right Leg I can't use it I can't even move it. The pain is unbearable. I'll help you if I CAN. in every way possible

My name is A1C Rufus J Mincey
100 FMS Davis Monthan
BLKs 4202 B 24.
3550 shop.

would you please Let somo one Know where I am.

4

UNIVERSITY OF ARIZONA
ARIZONA MEDICAL CENTER
UNIVERSITY HOSPITAL

PROGRESS NOTES

ENTER 1. Date & Time 2. Problem Name & No.	S = Subjective O = Objective A = Assessment P = Plan
	I don't say. I have to see a Lawyer I'm charged with murder so the police man says. Where is Delva I don't know who the police MAN WAS. which one WAS the MARK Did he have on cowboy boots. There are a lot of things that aren't clear. Two guys needed the one with the beard. John, who else when Do we go to TRIAL You didn't see Any body else No one saw Anybody else. IN the Apt. We'll get it together. why. It's void I don't sign I hate to sign things in the Blind.
Hust	This information was given so that it might Bring this case to a end. If ask me some questions. And I answered to the best of my ability at the present time. This is not to say I can't change my Information at A later Date, Because I'm not sure as of now

UNI-12-25 (rev 3/73)

UNIVERSITY OF ARIZONA
ARIZONA MEDICAL CENTER
UNIVERSITY HOSPITAL

FLOW SHEET

Linda present while pt wrote voluntarily. Elizabeth B Delva 10/28/74 2200 University Hospital. 2230 10-28-74 F.

		No Body Knew John + his old lady went for a walk to see where Chuck went. They came back and said Chuck was in the car with 2 guys. one of the guys came with Chuck. He left and when he came back all hell turned loose. When he came back a duel took place. Bust if you see I'm not for sure. People were all over the house I couldn't figure out I realize it was a ticket as rip off. I have a gun in the house 380 the place in particular. I showed it to Chuck and he showed me his. Look Like a 38 sp. TAKE to the car with him (he didn't take any drugs out of the apt) that's for sure. when he left. By his self. Rafael J Mercay

UNI-12-01

I can sign this because I remember those things. Not because I don is talking some bullshit. I

UNIVERSITY OF ARIZONA
ARIZONA MEDICAL CENTER
UNIVERSITY HOSPITAL

FLOW SHEET

I was present while Ric R. voluntarily wrote this. Elizabeth B Graham RN 10-28-74 2320

THATS why I HAVE To HAVE time to REDO ~~the~~ Every thing that happened in my mind.

NO body ANSWERED DOOR. WI GUN.

I DID Didn't HAVE A GUN

YOU SEE THATS SOMETHING ON ME. I WAS in the BED ROOM. LETS KAP TOMARROW. FACE to FACE. I CAN'T GIVE FACTS

IF SOMETHING HAPPENS THAT I DON'T KNOW ABOUT. WHY WOULD CHUCK GIVE JOHN his GUN. if he CAME WITH the GUY

QUESTIONS I NEED to KNOW.

WHEN I HEARD ALL the NOISE I RUN OUT to CHECK it OUT THEN I WENT BACK to the BEDROOM. WHERE was CHUCK I CAN'T SAY for SURE MAYBE the GUY had A GUN

UHI-12-01

UNIVERSITY OF ARIZONA
ARIZONA MEDICAL CENTER
UNIVERSITY HOSPITAL

FLOW SHEET

(I was present while the) (R. voluntarily wrote) this. Elizabeth B. Skousen
10-28 742320

If I dont Tell any lies I don't have to make things up to make the Lie look Like the truth. Let John talk. All he can do is tell the truth. or get Caught telling A Lie - SAME, SAME. I WANT A good LAWYER. I charged with murder thats back weather you did it or not. You don't have to prove you did something you have to " " didn't

Ohd. how many (dudes) came through that Door.
what Time will you come tomarrow. I'll be waiting I don't have to like I WANT some legal guidance I can't talk now what good is this doing. Every thing I have said is the truth. There are A lot of things left out. After I get A LAWYER you'll come. I won't Lie my Leg hurt I want to try to go to sleep. Tell Deb That I miss her.

UHI-12-01

STATE OF ARIZONA)
COUNTY OF PIMA) ss.

The foregoing instrument is a full, true, and correct copy of the original on file in this office.

Attested Oct 26 1977
NORMA M. FELIX, Clerk
By Jeanie Slick Deputy

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-5353

RUFUS JUNIOR MINCEY, Petitioner

vs.

THE STATE OF ARIZONA, Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRUCE E. BABBITT
The Attorney General

PHILIP G. URRY
Assistant Attorney General
1005 Pioneer Plaza
100 N. Stone Ave.
Tucson, Arizona 85701

Attorneys for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-5353

RUFUS JUNIOR MINCEY, Petitioner

vs.

THE STATE OF ARIZONA, Respondent

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BRUCE E. BABBITT
The Attorney General

PHILIP G. URRY
Assistant Attorney General
1005 Pioneer Plaza
100 N. Stone Ave.
Tucson, Arizona 85701

Attorneys for Respondent

I N D E X

TABLE OF CASES AND AUTHORITIES

TABLE OF CASES AND AUTHORITIES
(Continued)

JURISDICTION OF THIS COURT

Petitioner seeks review on writ of certiorari of the judgment of the Supreme Court of Arizona pursuant to 28 U.S.C. § 1257(3). Rule 19 of the Rules of the United States Supreme Court provides in part:

> "Rule 19. Considerations Governing Review on Certiorari.
> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The substance of his petition reveals

no special or important reasons for review on writ of certiorari. Moreover, the facts out of which the case arose are unique, and hence the decision below has no significant national impact. Finally, despite technical claims of error raised by Petitioner, the decision of the Supreme Court of Arizona was just. This is not an appropriate case for certiorari.

QUESTIONS PRESENTED

1. Whether the examination and search of Petitioner's apartment immediately after a police officer was fatally shot therein in the course of an arrest based upon probable cause, for the limited purpose of determining the circumstances of the officer's death, was unreasonable within the meaning of the Fourth Amendment to the United States Constitution.

2. Whether certain statements written by Petitioner in response to brief questioning by a police detective during Petitioner's recovery in the hospital were properly used to impeach Petitioner's testimony at trial.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case except to the extent amplified or controverted in the Arguments that follow.

ARGUMENT

I

THE EXAMINATION AND SEARCH OF PETITIONER'S APARTMENT IMMEDIATELY AFTER A POLICE OFFICER WAS FATALLY SHOT THEREIN IN THE COURSE OF AN ARREST BASED UPON PROBABLE CAUSE, FOR THE LIMITED PURPOSE OF DETERMINING THE CIRCUMSTANCES OF THE OFFICER'S DEATH, WAS NOT UNREASONABLE WITHIN THE MEANING OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Introduction

There are three distinct reasons why this Court should decline to exercise its jurisdiction to grant certiorari on the search issue in this case:

1. Petitioner could not legitimately claim a reasonable expectation of privacy with respect to the premises where he had recently had a gun battle with a police officer that resulted in serious injury to four people.

2. Application of the per se unreasonableness rule of United States -v- Chadwick, ____ U S ____, 97 S.Ct. 2476 (1977), Coolidge -v- New Hampshire, 403 U S 443 (1971) and Katz -v- United States, 389 U S 347 (1967) in this case would produce the anomalous result of invalidating a search that was patently reasonable under all the circumstances.

3. The state courts' murder scene exception to the warrant requirement is a

recent, developing doctrine that by its nature is infrequently applied. Based on the limited experience of the courts in this unique area, it would be premature for the Court to intervene at this time.

Reasonable Expectation of Privacy

Since Katz -v- United States, 389 U S 347 (1967) it has been settled that Fourth Amendment focuses not upon the nature of the location that is subjected to examination, but rather on the question of whether the examination invaded any affected person's reasonable expectation of privacy. As this Court stated in Katz:

> " . . . the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection. See Lewis -v- United States, 385 U S 206, 210; United States -v- Lee, 274 U S 559, 563. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U S at 351.

The Court made it clear in United States -v- Santana, 427 U S 38 (1976) that a person may lack a reasonable expectation of privacy even in an area closely associated with his or her residence. In Santana, police officers who had probable cause to arrest the defendant on narcotics charges drove up to her residence and saw her standing in the open doorway. They shouted "police" and ran toward her, while she retreated into her house. She was captured within, and narcotics were found. This Court upheld the warrantless arrest as having taken place in public within United States -v- Watson, 423 U S 411 (1976) (Stewart, J., concurring). In so holding, the Court specifically stated that the defendant was not in an area where she had any expectation of privacy, citing Katz, supra.

Applying Katz and Santana in the

instant case yields the conclusion that at the time of the search of which Petitioner complains, he had no reasonable expectation of privacy with respect to his apartment. The Court must bear in mind that this is not a case in which the police officers' initial intrusion was illegal. To the contrary, at the time of the intrusion the officers had direct, fresh information that Petitioner currently possessed a quantity of heroin and had recently made an unlawful offer to sell some of it. Their entry into the apartment was based upon probable cause to arrest Petitioner, and Petitioner does not challenge the legality of that entry.

Immediately after the police entered Petitioner's apartment, a shooting incident occurred between Petitioner and Officer Barry Headricks in which a total of four people sustained gunshot wounds. Because both participants were unconscious after

the shooting ceased, no one knew exactly what had occurred. Under those circumstances, Petitioner could not reasonably have expected that his premises would remain free from an immediate and thorough police investigation into exactly what had given rise to the shooting incident and its aftermath. The failure to obtain a warrant hence did not render the results of the investigation inadmissible.

Per se unreasonableness

Petitioner principally relies on the often-repeated rule that a warrantless search is per se unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions. United States -v- Chadwick, ____ U S _____, 97 S. Ct. 2476 (1977); Coolidge -v- New Hampshire, 403 U S 443 (1971); Katz -v- United States, 389 U S 347 (1967). Language in other decisions

of this Court, however, has recognized that rigidity is inappropriate in certain Fourth Amendment contexts. The Court stated in Ker -v- California, 374 U S 23 (1963):

> "This Court's long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application is carried forward when that amendment's proscriptions are enforced against the States through the Fourteenth Amendment. * * *
> The States are not . . . precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complaint." 374 U S at 33, 34.

And in Terry -v- Ohio, 392 U S 1 (1968) this Court stated:

> "The exclusionary rule has its limitations, however, as a tool of judicial control. It cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections." 392 U S at 13.

More recently, in United States -v- Edwards, 415 U S 800 (1974), the Court upheld the warrantless seizure of clothing from an arrestee in state custody. In discussing Cooper -v- California, 386 U S 58 (1967) the Court stated:

> "It was no answer to say that the police could have obtained a search warrant, for the Court held the test to be, not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable, which it was." 415 U S at 807.

The instant case points up a potential shortcoming of the per se unreasonableness rule, because to apply that rule blindly on these facts would result in

the mechanical invalidation of a patently reasonable search. The police initially entered Petitioner's apartment for the purpose of making lawful narcotics arrests. While the officers were engaged in effecting these arrests, a gun battle erupted in an adjoining room, leaving four people wounded. The officers were thus confronted with unmistakable evidence that a homicide had been committed. At the same time, because of the way in which the shooting incident occurred, the officers were completely in the dark as to the criminal or non-criminal nature of the homicide and the exact circumstances under which it occurred. As police officers, they had a duty to make an immediate and thorough investigation. Because Petitioner's reasonable expectation of privacy had already substantially dissipated as a result of the earlier lawful entry, the officers' examination of the

apartment to determine the circumstances of the shooting was reasonable within the Fourth Amendment.

Murder Scene Exception

The opinion of the Supreme Court of Arizona in State -v- Mincey, ____ Ariz. ____, 566 P.2d 273 (1977) upheld the denial of Petitioner's motion to suppress on the ground that

> "the search of a murder scene under certain circumstances [is] a valid exception to the constitutional warrant requirement." 566 P.2d at 283.

The Arizona Court first applied this doctrine in State -v- Sample, 107 Ariz. 407, 489 P.2d 44 (1971). There the defendant asked a neighbor for help and the neighbor summoned police. When the police arrived at defendant's mobile home, defendant exclaimed, "My God, I killed my wife." His wife's body was discovered in a bedroom, and defendant was conveyed to

the police station. About two hours later a police officer searched the mobile home without a warrant and seized certain tangible evidence. The Supreme Court of Arizona sustained the search, stating:

> "Reviewing the facts and circumstances in this case, ' the total atmosphere', we are convinced that the search was reasonable within the framework of the Fourth Amendment and the reasons for its existence. The traditional right of citizens to be free from unreasonable searches and seizures and unreasonable and unnecessary invasions of their privacy is not violated when the premises upon which a deceased victim is found are searched without a warrant." 107 Ariz. at 410.

A divided panel of the United States Court of Appeals for the Ninth Circuit later disapproved the search without addressing itself to the Arizona Supreme Court's rationale. Sample -v- Eyman, 469 F.2d 819 (9th Cir. 1972). Judge Jertberg dissented, adopting the opinion of the Supreme Court of Arizona as his dissenting opinion.

469 F.2d 819, 822-26.

In State -v- Duke, 110 Ariz. 320, 518 P.2d 570 (1974), the Supreme Court of Arizona distinguished Sample -v- Eyman, supra, and narrowed the rationale of State -v- Sample, supra, to validate a warrantless murder scene search conducted at the time the body was discovered. State -v- Superior Court, 110 Ariz. 281, 517 P.2d 1277 (1974). The Arizona Supreme Court's most recent refinement of the State -v- Sample rule occurred in its opinion in the instant case. There the court significantly narrowed the rule, as follows:

> "After reviewing this issue we are reaffirming our rule. We will set some guidelines, however, because we support the principle that '[s]earches conducted without a warrant issued upon probable cause are "per se unreasonable * * * subject only to a few specifically established and well-delineated exceptions". Schneckloth -v- Bustamonte, 412 U S 218 at 219, 93 S. Ct. 2041, at 2043, 36 L.Ed 2d 854 at 858 (1973)' State -v- Sardo,

> 112 Ariz. 509, 541 P.2d 1138 (1975). With the guidelines, infra, in this opinion, search of a murder scene is such a 'specifically established and well-delineated exception.' We hold a reasonable warrantless search of a homicide - or of a serious personal injury with likelihood of death where there is reason to suspect foul play - does not violate the Fourth Amendment to the United States Constitution where the law enforcement officers were legally on the premises in the first instance. We chose not to limit this warrant requirement exception only to actual murders because immediate action may be important to determine the circumstances of death and because a reasonable search should not later be invalidated because the intended murder victim may be saved by a medical miracle. For the search to be reasonable, the purpose must be limited to determining the circumstances of death and the scope must not exceed that purpose. The search must also begin within a reasonable period following the time when the officials first learn of the murder (or potential murder). Cf. State -v- Duke, supra." 566 P.2d at 283; Slip Opinion at 23.

It is apparent from examining State -v- Sample, supra, State -v- Duke, supra,

and State -v- Mincey, supra, that Arizona's murder scene exception is not a static doctrine which is mechanically applied to validate a broad range of warrantless searches. Cases in which the murder scene exception can be applied have arisen infrequently, and the exception has become narrower and better defined with each application. The murder scene exception is an evolving doctrine of relatively recent origin. The cases that have applied it [1] have significant potential for developing into a coherent and correct body of law covering a unique situation that does not fit into normal search and seizure categories. But because the doctrine is recent and the cases that apply it are few, this Court should decline to review it

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1/ See cases cited in State -v- Mincey, ____ Ariz. ____, 566 P.2d 273, 283 n.4; Slip Opinion at 22.

until its parameters are more fully developed by further applications in other fact situations.

Assuming the Court wishes to reach the merits, it should adopt the Arizona Supreme Court's formulation of murder scene exception as a proper and reasonable exception to Fourth Amendment's warrant requirement. The Arizona court's formulation is specifically designed to validate the immediate investigation of the scene of an actual or potential homicide for the limited purpose of discovering the circumstances thereof. The crucial limiting factor is that the murder scene exception applies only in those rare instances where the police have lawfully entered the premises of the search in the first instance. See, e.g., People -v- Wallace, 31 Cal. App. 3d 865, 107 Cal. Rptr. 659 (1963); State -v- Oakes, 276 A.2d 18 (129 Vt. 241) (1971), cert. denied, 404 U S 965 (1971). For that reason the

murder scene exception can never be used to justify an initial warrantless intrusion. Moreover, the murder scene exception is limited to homicide or potential homicides. As the court stated in State -v- Chapman, 250 A.2d 203 (Me. 1969):

> "There is no more serious offense than unlawful homicide. The interest of society in securing a determination as to whether or not a human life has been taken, and if so by whom and by what method, is great indeed and may in appropriate circumstances rise above the interest of an individual in being protected from governmental intrusion upon his privacy. In our view this is such a case. We see here no more than the 'legitimate and restrained investigative conduct undertaken on the basis of ample factual justification' which is not proscribed by the Fourth Amendment. Terry -v- State of Ohio, supra. The public had a right to expect and demand that the police would conduct a prompt and diligent investigation of these premises to ascertain the cause of this apparently violent death and to solve any crime committed in the course thereof. 250 A.2d at 210-11.

This Court should exercise its discretion to deny review on writ of certiorari on the question of the search of Petitioner's apartment.

ARGUMENT

II

PETITIONER'S WRITTEN RESPONSES TO DETECTIVE HUST'S QUESTIONING WERE PROPERLY USED TO IMPEACH PETITIONER'S TESTIMONY.

On October 28, 1974 Detective Hust of the Tucson Police Department questioned Petitioner at the Arizona Medical Center about four hours after he underwent surgery for his gunshot wounds. Although Petitioner was unable to speak, he wrote approximately six pages of answers on Arizona Medical Center "Flow Sheets". See Defendant's Exhibit D. At trial, the prosecutor used two of Petitioner's written responses to impeach his testimony. Petitioner now contends this was improper under Oregon -v- Hass, 420 U S 714 (1975) and Harris -v- New York, 401 U S 222 (1971). Specifically,

he contends (1) the impeaching statements were not inconsistent with his testimony and (2) the impeaching statements were untrustworthy and involuntary. He is wrong on both counts.

Inconsistency

In Harris -v- New York, 401 U S 222 (1971) this Court held that the petitioner's prior inconsistent statements, which were admittedly obtained in violation of Miranda -v- Arizona, 384 U S 436 (1966), could nonetheless be used to impeach his testimony at trial. The Court stated:

> "It does not follow from Miranda that evidence admissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." 401 U S at 224.

The question of the degree to which the impeaching statements were inconsistent with the petitioner's testimony played no part in the court's analysis. In Oregon

-v- Hass, 420 U S 714 (1975) the Court reaffirmed Harris, and again the degree of inconsistency was not discussed as part of the constitutional analysis.

Petitioner nevertheless contends the use of his written statement for impeachment violated Harris and Oregon because the statements were not inconsistent with his testimony. Contrary to the implication Petitioner seeks to raise, neither Harris nor Oregon require any particular degree of inconsistency as a constitutional matter. And United States -v- Hale, 422 U S 171 (1975), which recognized the requirement of inconsistency as a matter of general evidence law, expressly declined to rest its holding on constitutional grounds.

Assuming the question of inconsistency is material to Petitioner's constitutional claims, however, the record shows that Petitioner's written statements were in fact sufficiently inconsistent with his

testimony to provide "valuable aid to the jury in assessing petitioner's credibility . . . ." Harris -v- New York, 401 U S 222, 225. At trial, Petitioner testified:

"Q. You're quite sure that Officer Headricks fired at you first?

"A. Yes, sir.

"Q. You saw a gun in Officer Headrick's hand?

"A. Yes, sir.

"Q. What kind of gun?

"A. It was just a gun."

(R T June 6, 1975, p. 231, lines 10-17).

The prosecutor questioned Petitioner as follows concerning the written statements he had made to Detective Hust in the hospital:

"Q. Do you recall being asked, or do you recall telling Detective Hust at that time that you weren't even sure that

the guy who came in the bedroom had a gun?

"A. I can't say for sure because I don't know what I -- which guy he was talking about."

(R T June 6, 1975, p. 235, lines 16-21).

The statements the prosecutor referred to were as follows:

"When I heard all the noise I run out to check it out then I went back to the bedroom. Where was Chuck I can't say for sure maby the guy had a gun." Defendant's Exhibit D.

From the context of the written statement it is clear that the "guy" was the officer with whom Petitioner exchanged gunfire. The written statement expressing uncertainty about whether the "guy" had a gun was inconsistent with Petitioner's assertion at trial that he had seen the gun in his hand. The impeachment was therefore proper. Petitioner attempted to explain the inconsistency by saying he had not known

whether Detective Hust had been referring to Officer Headricks or the officer who stood over him after he had been shot. Although this explanation might have affected the weight of the impeachment, the trial court was not bound by it in ruling on admissibility.

Petitioner also testified:

"Q. (By Mr. Howard): Well, let me ask a further question. You suspected that it might be an arrest, a bust, didn't you?

"A. No, sir.

"Q. That never entered your mind?

"A. At what time?

"Q. At the time that Officer Headricks was coming across this room and you went and got your gun and started firing at him?

"A. No, sir.

"Q. Never entered your mind?

"A. No sir."

(R T June 6, 1975, p. 252, line 21 - p. 253, line 6).

The prosecutor thereafter impeached Petitioner's testimony by showing that he had intially called the incident a "bust" in responding to Detective Hust's questions in the hospital. Although Petitioner explained that he called it a "bust" because he had learned earlier that he had shot a police officer, the inconsistency remained, and the trial court was not bound to accept his explanation.

Trustworthiness

Petitioner also contends the use of his written statements against him violated Harris, supra, and Oregon, supra, because the statements were involuntary and untrustworthy. Petitioner bases this contention on an incomplete and sometimes inaccurate statement of the circumstances surrounding

the questioning of Petitioner in the hospital. Detective Hust testified:

"Q. Had you received permission prior to talking to him, from hospital personnel?

"A. Yes.

"Q. From whom?

"A. I believe I talked with Dr. Farrel, and again the nurses checked with somebody to get it authorized."

(R T February 3, 1975, p. 170 lines 11-18).

Detective Hust also testified:

"Q. Did you ever stop questioning Mr. Mincey when he asked for an attorney?

"A. I believe I advised him if he wanted an attorney I could no longer talk to him. Also that he had the right to refuse to answer any

question he wished to.

"Q. Did he ever report his responses to that question anywhere in his statement, that he wished to begin talking to you?

"A. No, I don't believe so. I believe it was with an affirmative nod of the head."

(R T February 3, 1975, p. 165 line 19 - p. 166, line 2).

The record thus does not support Petitioner's contention that he was forced to continue answering questions when he wished to stop.

Petitioner asserts that he lapsed into unconsciousness at least twice during questioning by Detective Hust. Detective Hust, however, testified that Petitioner did not lose consciousness at any time during the course of the questions and answers. (R T February 3, 1975, p. 184, lines 5-8). Moreover, when Petitioner

appeared to become tired and slow down, Detective Hust voluntarily left the room. (R T February 3, 1975, pp. 186-87).

Petitioner states that he "indicated repeatedly that he wished the questioning discontinued." Detective Hust, however, testified:

"Q. Did he other than the mention of a lawyer on several occasions, did he tell you he didn't want to talk to you?

"A. No.

"Q. Did he at any time, in fact, request that you return and talk to him again?

"A. Yes.

"Q. Did you do anything to force or duress or use duress in any way with regard to Mr. Mincey?

"A. No.

(R T February 3, 1975, p. 184, lines 5-19).

Elizabeth Graham testified she did not know whether Petitioner had received any drugs while in the hospital. There was no evidence that he had received any drug that would have impaired his mental functioning. Ms. Graham testified:

"Q. Were there any head injuries?

"A. No.

"Q. Did Mr. Mincey appear to be alert and understand what questions Detective Hust asked him?

"A. Yes.

"Q. Did Detective Hust or anyone else that was present do anything to force Mr. Mincey to answer questions?

"A. No.

"Q. Did anybody physically abuse Mr. Mincey during the course of the questions by

Detective Hust?

"A. No sir.

"Q. Did anyone mentally abuse Mr. Mincey, that is, threaten him or call him names during the course of this procedure?

"A. No."

(R T February 3, 1975, p. 196, lines 4-19).

Finally, the lucidity and continuity of Petitioner's written statements belie his claim of involuntariness and untrustworthiness. For example, Petitioner wrote as follows:

> "No Body knew John + his old lady went for a walk to see where Chuck went. They came back and said Chuck was in the car with 2 guys. One of the guys came with Chuck. He left and when he came back all hell turned loose. When he came back a bust took place. Bust. You see I'm not for sure. People were all over the house. I couldn't figure out wheather it was a bust or rip-off." Defendant's Exhibit D.

And:

> "This infromation was given so that It might Bring this case to a end. You asked me some questions and I answered to the best of my ability at the present time. This is not to say I can't change my Infromation at a later Date, because I'm not sure as of now." Defendant's Exhibit D.

There is no basis in the record for Petitioner's claim that his statements were involuntary and untrustworthy in violation of Harris, supra, and Oregon, supra. This Court should decline to review Petitioner's voluntariness claim on writ of certiorari.

CONCLUSION

For the foregoing reasons, Respondent respectfully urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

BRUCE E. BABBITT
The Attorney General

Philip G. Urry

PHILIP G. URRY
Assistant Attorney General

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
)ss.
County of Pima)

PHILIP G. URRY, being first duly sworn deposes and says:

I am an Assistant Attorney General for the State of Arizona. As such I did cause to be hand delivered on the 23rd day of September, 1977 three (3) copies of BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to:

FREDERICK S. KLEIN
KLEIN & KLEIN
306 Pioneer Plaza
100 N. Stone Ave.
Tucson, Arizona 85701

and three (3) copies of BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to be deposited in the United States mail addressed to:

RICHARD OSERAN
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P. O. Box 70
La Placita Village
Tucson, Arizona 85702
Attorneys for Petitioner

and mailed on the 23rd day of September, 1977.

All parties required to be served have so been served.

Philip G. Urry
PHILIP G. URRY

SUBSCRIBED AND SWORN to before me the undersigned Notary Public on this the 23rd day of September, 1977.

Sarah E. Milosky
Notary Public

My Commission Expires:
12-9-80

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5353

RUFUS JUNIOR MINCEY,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

PETITIONER'S BRIEF

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v.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

PETITIONER'S BRIEF

OPINION BELOW

The opinion of the Supreme Court of the State of Arizona, filed May 11, 1977, is reported at _____ Ariz. _____, 566 P.2d 273, and is found in the Appendix (hereinafter referred to as App.). Page *97-117*.

JURISDICTION

The judgment of the Supreme Court of Arizona was entered on May 11, 1977. Timely motions for rehearing by both parties were

denied on June 28, 1977. A Petition for Writ of Certiorari and Motion to proceed in forma pauperis were filed within ninety (90) days of that date, and were granted by this Court on October 17, 1977. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal United States Constitutional provisions involved are the Search and Seizure Clause of the Fourth Amendment, Self-Incrimination Clause of the Fifth Amendment, Right to Counsel Clause of the Sixth Amendment and Due Process Clause of the Fourteenth Amendment, the pertinent texts of which are as follows:

Amendment Four:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment Five:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

Amendment Six:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Amendment Fourteen, Section 1:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

QUESTIONS PRESENTED

1. Did not the admission of evidence seized in a four day long warrantless search of Petitioner's residence, after the residence had been secured by police, violate Petitioner's rights under the Fourth and Fourteenth Amendments to the Constitution?
2. Did not the admission of Petitioner's responses to police questioning made while Petitioner was a patient in the intensive care unit of a hospital violate Mr. Mincey's privilege against self-incrimination, and rights to counsel and due process of law under the Fifth, Sixth and Fourteenth Amendments to the Constitution?

STATEMENT OF THE CASE[1]

Arrest and Search

The case at bar arises out of an incident in Tucson, Arizona on October 28, 1974, in which an undercover police narcotics officer was fatally wounded. At approximately 2:00 p.m. on that date, in

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[1]For citations to portion of record not appearing in App., the following abbreviations will be used:

Mincey's handwritten statement appended to brief (App. Br. _____);
Trial Transcript (T.T. _____);
Grand Jury Transcript (G.J.T. _____);
Hearing Transcript January 31, 1975 (H.T.J. _____);
Hearing Transcript February 3 and 4, 1975 (H.T.F. _____).

an attempt to buy a quantity of unlawful drugs, undercover officer Barry Headricks accompanied by Charles Ferguson went to an apartment leased by Mr. Mincey. App. 98, G.J.T. 18. Officer Headricks, in order to disguise his true identity as a police officer, wore longish hair, a mustache, a flower print shirt, cowboy boots, levis and a levi jacket. App. 23. After being admitted into the apartment, an offer was allegedly made to sell narcotics for which Charles Ferguson and Mr. Mincey were later charged.

Undercover agent Headricks left the apartment, allegedly to return with money in order to complete the purchase. App. 99. According to a prearranged "plan" Headricks returned with nine other armed plainclothes narcotics agents and a Deputy Pima County attorney. App. 22, 24. Their intention was to gain entry by the use of a ruse, and upon entry, to arrest the occupants of the apartment and seize any evidence. App. 21, 22, 24. Headricks and another agent, with their drawn guns hidden behind their backs approached the apartment door. App. 99, H.T.F. 9, 18, 19. The remaining officers and county attorney, with guns drawn, hid in the hallway on either side of the door. App. 25, 27, 99, H.T.J. 147. The door was opened by John Hodgman. App. 24, 99, H.T.F. 10.

After Headricks slipped into the apartment, Hodgman attempted to close the door. App. 24, 26, 99, H.T.F. 10-11. The other agents forced entry (App. 24, 26, 99) pushing Hodgman partly through the wall behind the door. App. 27, 99, H.T.F. 40. Headricks entered the bedroom at the back of the apartment and shortly thereafter some thirteen gunshots were heard in rapid succession coming from the bedroom. App. 41, 99, H.T.J. 149, G.J.T. 63-64. In the gunfire Officer Headricks and the two bedroom occupants, Mr. Mincey and Deborah Johnson, were wounded. App. 33-35, 41, 100. Charles Ferguson was also wounded by a bullet which passed through the bedroom wall. App. 41, 99, G.J.T. 45-47. When the shooting had stopped, Headricks came out of the bedroom, said something like "he's down" and fell to the ground. App. 100, H.T.F. 41-42, G.J.T. 49.

Mr. Mincey was found lying on his back in the bedroom, unconscious. App. 41, 100. The entire incident transpired in a matter of seconds. H.T.J. 149.

After the shooting, the narcotics officers secured the crime scene for the arrival of a special investigative unit. App. 27-29. The narcotics agents themselves did not search or seize anything. App. 27, 30, 37. From the time of the shooting until approximately four days later when the search conducted by the investigative unit was completed, the apartment was in the exclusive control of the police. App. 27-29, 32-33, 37-39.

The investigating unit conducted a "systematic" search of the premises over a four day period. App. 35-38, 77. The expressed purpose of the search was to uncover "narcotics paraphernalia". App. 36. During the course of the search the leader of the investigative unit was informed that Officer Headricks had died at the hospital. App. 37.

The search was exhaustive. Every room, drawer and cupboard was searched and inventoried, including all of Mr. Mincey's personal belongings. App. 37-39, 77-82. No search warrant was ever obtained, nor was any reason given by the investigating agents for not obtaining one. App. 29, 38. No exigent circumstances existed at the time of the search. *State v. Mincey*, _____ Ariz. _____, 566 P.2d 273, 283 (1977).

Interrogation

Shortly after the shooting incident, while Mr. Mincey was in the emergency room of the hospital, police Detective Hust arrived at the hospital and removed the handcuffs from Mr. Mincey in order to facilitate treatment by the medical staff. App. 42-43. Mr. Mincey was depressed near to the point of coma and breathing insufficiently. App. 82-83. Resuscitative drugs were administered in an effort to aid Mr. Mincey. App. 82-83. A part of Mr. Mincey's pelvic bone, the neck of his thigh and his femur had all been struck by the bullet. App. 82. The bullet had also at least partially severed Mr. Mincey's sciatic nerve, a nerve which controls "large muscle movements with the lower leg". App. 83.

The next contact that Detective Hust had with Mr. Mincey was three or four hours later in the intensive care unit of the hospital, after Mr. Mincey had undergone surgery. App. 43-44. After obtaining permission from a nurse, Elizabeth Graham, Hust began interrogating Mr. Mincey. App. 65. Nurse Graham also told Mr. Mincey that it would help if he cooperated with Detective Hust's questioning. App. 65-66.

Mr. Mincey was unable to talk at the time of the interrogation due to the presence of an intertracheal tube inserted down his throat to administer oxygen. App. 44-45, 62. He also had a Foley catheter tube inserted through his penis to his bladder, a tube running from his nose down into his stomach to prevent the aspiration of vomit, and was receiving intravenous fluids. App. 66-67. In addition, Mr. Mincey had received antibiotic and antitetanus drugs. T.T. June 3, 1975 Page 51.

Mr. Mincey, being unable to talk, responded to Detective Hust's questions by writing his answers on paper provided by the hospital. App. 46. Detective Hust did not record the questions he asked, but at a later date attempted to reconstruct the questions from Mr. Mincey's written responses and notes made by the detective the following morning. App. 45-47, 61.

Detective Hust initially began his interrogation of Mr. Mincey with questions concerning Charles Ferguson. App. 46-47. Thereafter, Detective Hust read Mr. Mincey his *Miranda* rights and told him that he was under arrest for killing a police officer. App. 50, 60. Mr. Mincey repeatedly advised his interrogator that he could respond no more without an attorney. App. 47-49, 61, 91. App. Br. 3, 4, 7, 9. However, the interrogation continued.

On at least six separate occasions during the interrogation Mr. Mincey requested the assistance of counsel. App. 91, 93, App. Br. 3, 4, 7, 9. On three occasions Mr. Mincey made unambiguous written requests that the questioning be stopped. App. Br. 3, 4, 7, 9. Also, on numerous occasions, Mr. Mincey expressed his confusion and uncertainty as to his ability to accurately recall the facts. App. 47-49, App. Br. 3, 4, 7, 9. Mr. Mincey expressed the

fear that without the aid of counsel, he "might saw [sic] something thinking that it meant something else". App. Br. 7. Mr. Mincey further advised Detective Hust that he was experiencing unbearable pain. App. 48-49, App. Br. 7, 9.

Mr. Mincey was exhausted throughout the interview. On three occasions during the course of the interview, Detective Hust left the room when "the nurse or doctor would have to go in to do certain medical things or if it looked as if he [Mincey] was getting a little bit exhausted . . ." App. 59. Nurse Graham testified that Mr. Mincey had not slept since his arrival in the intensive care unit because there were "so many admitting things to pester him with". App. 66. Mr. Mincey's confusion is illustrated by his uncertainty regarding whether the same person had conducted the various sessions of questioning. App. 92-93.

Detective Hust testified that the duration of the interrogation was only an hour. The time readings on the upper right hand corners of the papers upon which Mincey wrote his statement (20:15, 22:30 and 23:20) indicate that the questioning lasted over three hours. App. Br. 3 (20:15), 5 (22:30) and 8-9 (23:20).

Finally, Mr. Mincey was ignorant of the law and of law enforcement techniques. He had never been in trouble with the law before. Regarding his procedural rights in his trial, he stated, "they don't have to prove you did it, you have to prove you didn't do it." App. 93, App. Br. 9.

Trial and Appeal

At the time of trial Rufus Mincey, a black man, was a twenty-three year old United States Air Force machinist who, prior to the aforementioned incident, had never been charged with a felony. He was charged with, tried by a jury, and convicted of first degree murder (committed in avoiding or preventing a lawful arrest), Ariz. Rev. Stat. Ann. §§13-451, 452 and 453, assault with a deadly weapon, Ariz. Rev. Stat. Ann. §13-249(B), unlawful sale of narcotics, Ariz. Rev. Stat. Ann. §36-1002.02, unlawful

possession of a narcotic drug for sale, Ariz. Rev. Stat. Ann. §36-1002.01, and unlawful possession of a narcotic drug, Ariz. Rev. Stat. Ann. §36-1002. He was sentenced to life imprisonment without possibility of parole before serving twenty-five years on the first charge, ten to fifteen years imprisonment on the second, concurrent with the first; five to fifteen years imprisonment on the third, consecutive to the life sentence; five to six years imprisonment on the fourth, concurrent with the third; and two to three years imprisonment on the fifth charge, concurrent with the third.

At trial, Mr. Mincey's attorney moved to suppress the evidence seized in the search of Mr. Mincey's apartment which included bullets, narcotics and narcotics paraphernalia. The motion was denied. Mr. Mincey's attorney also moved to suppress the statements made during Mr. Mincey's hospital interrogation. That motion was granted. However, over Mr. Mincey's objection, the trial court allowed the statements made during his interrogation to be used to impeach his testimony at trial. App. 74.

On appeal, the Arizona Supreme Court reversed Mr. Mincey's convictions for murder and assault with a deadly weapon because of an erroneous mens rea instruction but affirmed the convictions on the remaining counts. Because the sentences on the affirmed counts were originally to have run consecutively to the life sentence on the murder charge, the court remanded the affirmed counts for reimposition of sentences. _____ Ariz. _____, 566 P.2d 273, 285. The Arizona Supreme Court held that the evidence obtained in the search and interrogation here challenged was properly admitted. The court found that the search of Mr. Mincey's residence did not come within the exigent circumstances exception to the warrant requirement, but held that it was justified by a "murder scene" exception, discussed in more detail hereafter. In so doing, the court expressly refused to follow the decision of the United States Court of Appeals for the Ninth Circuit in *Sample v. Eyman*, 469 F.2d 819 (9th Cir. 1972).

Further, the court held that Mr. Mincey's responses during his in-hospital interrogation were voluntarily made and, therefore, were properly admitted for impeachment under *Harris v. New York*, 401 U.S. 222 (1971). Both Mr. Mincey and the State of Arizona timely moved for rehearing of the Arizona Supreme Court's opinion. Both motions were denied on June 28, 1977. Petitions to this Court for a writ of certiorari and Motion to proceed in forma pauperis were granted on October 17, 1977.

SUMMARY OF ARGUMENTS

I.

The admission of evidence obtained in a four day long warrantless search of Mr. Mincey's apartment could not be justified under any of the traditional exceptions to the Fourth Amendment warrant requirement. The Arizona Supreme Court upheld it under a "murder scene exception."

This Arizona exception, as applied to Mr. Mincey, is inconsistent with the principles and purposes of the Fourth Amendment. The search of Mr. Mincey's apartment constituted a substantial intrusion upon his reasonable expectation of privacy. Instead of the detached prescreening of a magistrate, Arizona's exception makes determinations whether or not a search is to be made dependent upon the hurried discretion of a police officer engaged in the often competitive enterprise of law enforcement, and it is not even clear that probable cause is required for a search under the Arizona exception. The scope of searches under the Arizona exception is virtually unlimited. And an individual questioning the officer's authority to search has no evidence of the officer's authority and must question at his peril.

There is no legitimate or compelling rationale which justifies the Arizona exception's deviation from the Fourth Amendment warrant requirement. No other state has gone as far toward

disembowelling the Fourth Amendment warrant requirement as Arizona does in Mr. Mincey's case.

II.

The admission of Mr. Mincey's responses to police questioning made while in the hospital's intensive care unit was not justified by *Harris v. New York*, 401 U.S. 222 (1971). Mr. Mincey's responses were not inconsistent with his trial testimony, and inconsistency is implicit in the rationale of *Harris*.

The responses also did not fit the *Harris* requirement of statements which are voluntary and trustworthy. Mr. Mincey's responses were given while he was tired, weak, confused, and in pain. They were given when the interrogating officer persisted in questioning despite Mr. Mincey's repeated requests to discontinue the questioning and to obtain a lawyer to be present during questioning. Mr. Mincey was isolated and helpless to control his situation. The responses were the product of an overborne will.

The lack of reliable records of the questions to which responses were given, and the lack of a finding of voluntariness by the trial court also violated due process.

ARGUMENTS

ARGUMENT I

THE ADMISSION OF EVIDENCE OBTAINED IN A FOUR DAY WARRANTLESS SEARCH OF MR. MINCEY'S RESIDENCE AFTER THE RESIDENCE HAD BEEN SECURED BY POLICE VIOLATED MR. MINCEY'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION

The Arizona Supreme Court upheld the admission of evidence which was the fruit of the warrantless, four day search of Mr. Mincey's residence. That Court ruled the evidence admissible under a state court created "murder scene exception", a warrantless search is lawful where (1) the search occurs at the scene of a serious personal injury with likelihood of death, (2) there is reason to suspect foul play, (3) law enforcement officers were legally on the scene premises in the first instance, (4) the search begins within a reasonable time after officials first learn of the murder or potential murder, and (5) the search is "limited [in scope] to determining the circumstances of death". App. 112. *State v. Mincey*, _____ Ariz. _____, 566 P.2d 273, 283 (1977). The Court conceded that the search of Mr. Mincey's residence did not "fit within the usual 'exigent circumstances' exception and that there was ample time to secure a warrant". App. 111. Thus, if the Fourth Amendment does not countenance Arizona's "murder scene exception", the search here was unlawful and the evidence seized therein should have been excluded. *Mapp v. Ohio*, 367 U.S. 643 (1961).

This Arizona judicially created exception to the warrant requirement cannot stand consistently with the long standing principles and purposes embodied within the Fourth Amendment.

The Fourth Amendment protects people, not places. *Katz v. United States*, 389 U.S. 347, 351 (1967). It protects people from

unreasonable government intrusions into their legitimate expectations of privacy. *United States v. Chadwick*, 97 S.Ct. 2476, 2481 (1977).

The general rule of the Fourth Amendment is that searches conducted without a warrant, that is, without the prior approval of a judge or magistrate, are per se unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); exceptions to the rule are jealously and carefully drawn and the burden is on those seeking the exception to show the need for it.

The searches and seizures which were foremost in the minds of the framers of the Bill of Rights were those involving invasions of a person's home. *United States v. Chadwick*, 97 S.Ct. 2476, 2481 (1977). By tradition, a person's home was his castle and fortress. *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1604) (Lord Coke). Just such a search took place in this case. Mr. Mincey never consented to a search, never relinquished his expectation of privacy from government intrusion into his home. The degree of intrusion to which he was subjected is manifested by the fact that the search extended over a four day period, that it included inventorying every single item in Mr. Mincey's residence, and that every room, drawer, cupboard, nook and cranny was searched.

One foundation of the warrant requirement is that it requires the detached scrutiny of a neutral magistrate before any intrusion takes place. Such detached consideration is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

Arizona's murder scene exception substitutes for judicial scrutiny the discretion of a law enforcement officer who is charged with determining whether an apparent or suspected injury is "serious", "likely to produce death", and whether "there is reason to suspect foul play". The degree of conviction the officer must have, be it suspicion, reasonable grounds for belief,

clear and convincing evidence, belief beyond a reasonable doubt, etc., is not spelled out by the Arizona Supreme Court. Both the terms "reasonable to believe" and "possibility" are used. *State v. Mincey*, 566 P.2d at 284. The Arizona Supreme Court could not claim that police officers in general have any medical expertise rendering them specially qualified to determine whether an injury is likely to produce death. In any event, the officer's discretion is the sole protection an individual has against governmental intrusion. *Cf., Johnson v. United States*, 333 U.S. 10, 14 (1948). Only if the search is fruitful, is it likely there will be some judicial scrutiny of the matter. And then, the scrutiny is not based upon contemporaneous recollection. Instead, the scrutiny must be based upon the recollections of an officer who has the benefit of hindsight.

Another foundation of the warrant requirement is that it helps limit the scope of intrusions: it is more likely that a search will not exceed proper bounds when it is done pursuant to a judicial warrant particularly describing the place to be searched and the persons or things to be seized. *United States v. Chadwick*, 97 S.Ct. 2476, 2482 (1977). Although the Arizona Supreme Court purported to place limitations (to what is necessary to determine the circumstances of death) upon the scope of "murder scene" searches, in reality, it did not. What true limitations are there if, as in Mr. Mincey's case, the "limitations" permit the police to conduct a four day long search, inventorying every item in a man's home, when their expressed intention at the outset is to find evidence of narcotics, rather than to establish the circumstances of death.

A third foundation of the warrant requirement is that it apprises an individual of the extent of his privacy rights and the extent of police authority. It assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search. *Cf., Camara v. Municipal Court*, 387 U.S. 523, 532 (1967). Under the "murder scene" exception, an individual

questioning an officer's authority to search or seize can only bar his way or progress and risk arrest and criminal conviction.

The search of Mr. Mincey's residence was remote from and not incident to an arrest within the meaning of *Chimel v. California*, 395 U.S. 752 (1969). It was not justified by any exigent circumstances depriving the officers of time to obtain a warrant and threatening the safety of the police or the loss or destruction of evidence. *State v. Mincey*, 566 P.2d 273, 283 (Ariz. 1977). It may be noted that a judicial warrant could have been obtained at any time by telephone or other remote communication. 5 Ariz. Rev. Stat. Ann. §13-1444(C) (Supp. 1973). It may also be noted that in this case there was a prosecutor actually on the scene at the time the premises to be searched were entered. Further, the searched premises were placed under the exclusive dominion of police authority prior to the search.

What justification does the Arizona Supreme Court claim for its "murder scene" exception? It offers no explanation of the rationale for permitting a "murder scene" exception in its opinion in this case and none is provided in *State ex rel. Berger v. Superior Court*, 110 Ariz. 281, 517 P.2d 1277 (1974). Indeed, the only explanation ever offered by the Arizona Supreme Court for creating such an exception was the argument that such warrantless searches were justified by the "need for all citizens and particularly potential victims such as this to effective protection from crime". *State v. Sample*, 107 Ariz. 407, 410, 489 P.2d 44, 47 (1971), *writ of habeas corpus ordered conditionally granted*, sub nom. *Sample v. Eyman*, 469 F.2d 819 (9th Cir. 1972); *see State v. Duke*, 110 Ariz. 320, 324, 518 P.2d 570, 574 (1974).

If "effective protection [of potential victims] from crime" is the rationale for warrantless searches, who was it the police were protecting in Mr. Mincey's case when all of the suspects were in custody before the search began? If "effective protection from crime" is the rationale, why should there be more protection afforded where alleged crimes involve bodily injury than for

other classes of crimes? The Arizona Supreme Court has simply made an arbitrary determination that cases involving bodily injury are more serious than other cases and require less attention to the protection of individual rights. If Arizona can make such a determination now, then in the future it or other jurisdictions can abolish the search warrant requirement in cases of rape, espionage, treason, extortion, kidnapping, terrorism, arson, counterfeiting, robbery and burglary, each of which is a class of crimes posing serious threats to society.

Who is to say which class of crimes is most serious? The argument that more "effective" protection from crime is needed is an argument which may be made against every restraint the Constitution imposes upon police authority in the interest of personal liberty. Moreover, the Arizona Supreme Court has never shown, and it could not show, how its proposed exception to the warrant requirement would significantly increase police protection over that permitted by the traditional exigent circumstances exception.

There is no legitimate rationale for Arizona's murder scene exception.

The "murder scene" exception is not a doctrine permitting police entry upon premises. It is a doctrine permitting warrantless searches.

In some instances, courts have spoken about murder scene exceptions to warrant requirements when their intent was to authorize police to enter premises with the intent of rendering emergency aid. *See Root v. Gauper*, 438 F.2d 361, 364-65 (8th Cir. 1971). Even if such had been a consideration in the development of the Arizona doctrine, the police here did not enter with the intent of making arrests. The search itself occurred after the injured people had been removed from the premises.

The police in Mr. Mincey's case knew before the search began that Officer Headricks' injuries had resulted from gunshot wounds. The search, therefore, was not conducted in aid of treatment, as for example might be the case in a poisoning incident.

If the Respondent claims, as a rationale for the exception that the record in this case would have justified the issuance of a warrant, this Court has already answered that issue.

> "Even though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn. In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority". *United States v. Chadwick*, 97 S.Ct. 2476, 2486 (1977).

The Arizona Supreme Court first claimed a "murder scene" exception in *State v. Sample*, 107 Ariz. 407, 489 P.2d 44 (1971), but the United States Court of Appeals for the Ninth Circuit refused to accept such an exception and directed that a writ of habeas corpus be issued for Sample unless retrial proceedings against him were commenced within ninety (90) days. *Sample v. Eyman*, 469 F.2d 819 (9th Cir. 1972).

There is no other jurisdiction which has attempted to carve as broad an exception to the warrant requirement as Arizona's "murder scene" exception. In Mr. Mincey's case, the Arizona Supreme Court relied on six cases from other jurisdictions. *State v. Mincey*, 566 P.2d 273, 283 n.4 (1977). None of those cases, however, are analogous to Mr. Mincey's case. Most of them seem to be primarily concerned with a doctrine justifying police entry upon the premises.

Stevens v. State, 443 P.2d 600 (Alaska 1968) did not rely upon or declare a "murder scene" exception. Rather, it held that where an investigating officer was lawfully on the scene and all items seized, photographed, etc. had been in his plain view, a delay of ten hours before the items were seized, occasioned by the first officer waiting ten hours until better trained officers could make their way to the remote village involved, was not unreasonable or constitutionally violative. *Stevens v. State*, 443 P.2d at 602-03.

Likewise, there is no reference to a "murder scene" search warrant exception in *Patrick v. State*, 227 A.2d 486 (Dela. 1967). The opinion simply holds that police who came on the premises

for the purpose of bringing emergency aid to a reportedly injured person were lawfully on the premises and there was no search where they seized items in plain view.

In *People v. Wallace*, 31 Cal. App.3d 865, 107 Cal. Rptr. 659 (1973), although there is language suggestive of a murder scene exception, the facts are distinguishable from Mr. Mincey's case. *Wallace* gave suspicious and conflicting explanations for the victim's injury. He invited police on the premises, his home. The police had reasonable grounds to believe the victim had been stabbed and that the weapon was still on the premises. The opinion carries the implication that the police had insufficient evidence to arrest *Wallace* and had reason to believe that evidence of a battery or homicide would be destroyed if they did not act quickly. In fact, later California cases interpret *Wallace* as an exigent circumstances case. *People v. Eckstrom*, 43 Cal. App.3d 996, 118 Cal. Rptr. 391 (1974); *People v. Superior Court*, 41 Cal. App.3d 636, 116 Cal. Rptr. 24 (1974).

State v. Chapman, 250 A.2d 203 (Me. 1969), which also contains some broad language, is also distinguishable on its facts. The defendant invited officers on the premises and consented to their "look[ing] around". Circumstances existed which gave the police reason to believe that evidence would be lost if they didn't act quickly. The evidence seized was in plain view except for one item which was found in a trash barrel, (the Court thought this was not abandoned because the barrel was in the garage and the seized item had been stuffed down underneath some trash).

Similarly *State v. Oakes*, 129 Vt. 241, 276 A.2d 18, *cert. denied*, 404 U.S. 965 (1971) is distinguishable on its facts. The police entered the premises at the defendant's invitation, and all items later seized were in plain view. A delay in completing the investigation due to a shortage of manpower in the rural area was not unreasonable. A warrant was obtained before detailed investigation began. And, in any event, any error in receiving the evidence was harmless since it tended to prove matters which were not contested at trial.

In *Loguest v. State*, 495 P.2d 575 (Wyo.), *cert. denied*, 409 U.S. 1006 (1972), the police entered in response to a telephone call from the defendant to a third person and with the aim of rendering emergency aid if the victim was alive. All items seized, except one, were in plain view. And if there was error in receiving the evidence, it was harmless since it related to uncontested matters.

The search in this case violated the spirit, purpose and letter of the Fourth Amendment. The evidence which derived from that search should have been suppressed.

ARGUMENT II

THE ADMISSION OF MR. MINCEY'S RESPONSES TO POLICE QUESTIONING MADE WHILE MR. MINCEY WAS A PATIENT IN THE INTENSIVE CARE UNIT OF A HOSPITAL VIOLATED HIS PRIVILEGE AGAINST SELF-INCRIMINATION, AND RIGHTS TO COUNSEL AND DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

The use of Mr. Mincey's responses to police questioning while in the hospital's intensive care unit violated his privilege against self-incrimination, and rights to counsel and due process of law under the Fifth, Sixth and Fourteenth Amendments to the Constitution. The trial court and the Arizona Supreme Court found the responses to have been obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1964). However, both the trial court and the Arizona Supreme Court sustained their admissibility as within the exception created by *Harris v. New York*, 401 U.S. 222 (1971). *State v. Mincey*, _____ Ariz. _____, 566 P.2d 273, 280, 281 (Ariz. 1977). As this Court is

aware, *Harris* and the decisions which have followed it[2] permit an accused person to be impeached[3] with *Miranda* violative statements if (1) the statements are inconsistent with the accused's testimony at trial bearing directly on the crime charged, and (2) the statements were obtained under circumstances assuring their trustworthiness and voluntariness. The statements in the case at bench meet neither requirement.

The responses used for impeachment were not inconsistent with Mr. Mincey's testimony at trial. Mr. Mincey testified that he had seen a gun in Officer Headricks' hand when Headricks entered the bedroom. App. Page 84, T.T. June 5, 1975 Page 162-164. As impeachment, the prosecution offered a statement made in response to a question which asked, did "this guy" who came into the bedroom have a gun? App. Page 86, 87. The response had been, "I can't say for sure. Maybe he had a gun," and Mr. Mincey indicated that he hadn't been sure whether by "this guy" the interrogator had mean't Headricks or the officer who found him after he'd been shot, or what. App. Page 92.

Mr. Mincey also testified that at the time Officer Headricks entered the bedroom with his gun drawn, he had no idea the entry was for purposes of making an arrest. App. Page 88, 89. The prosecutor offered a statement made in response to a question regarding what Mr. Mincey had meant when he wrote that "all hell turned loose". App. Page 89. Mr. Mincey's response, given at a time when he had already been informed that he was under arrest and being charged with the murder of a police officer (App. Page 50, 60) was that he meant when the "bust" took place. App. Br. Page 5. That response simply indicated that several hours after Headricks entered his bedroom and after Mr. Mincey had been made aware that Headricks and his companions were police

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[2]E.g. *Oregon v. Haas*, 420 U.S. 714 (1975)

[3]Arizona permits prior inconsistent statements to be considered by the jury as substantive evidence. *State v. Skinner*, 110 Ariz. 135, 515 P.2d 880 (1973).

officers, and after Mr. Mincey had been advised that he was under arrest and was being charged with murder of a police officer, Mr. Mincey knew that the commotion had resulted from a police "bust"; it did not indicate what his knowledge or state of mind was at the time of the break-in.

The rationale for permitting an exception to the *Miranda* exclusionary rule is that the shield provided by *Miranda* should not be perverted into a license to testify inconsistently or perjuriously. *Harris v. New York*, 401 U.S. 222, 226 (1975); *Oregon v. Haas*, 420 U.S. 714, 722 (1975). That rationale becomes meaningless if the statements introduced to impeach are not in fact inconsistent. Inconsistency, therefore, is an integral part of the *Harris* admissibility test. Furthermore, as this Court has recognized, it is basic to the law of evidence that before a prior statement can be used to impeach by inconsistency, the statement must indeed be inconsistent. *United States v. Hale*, 422 U.S. 171 (1975). And a witness must be given full opportunity to clarify his statement before impeachment testimony may be admitted. *The Charles Morgan*, 115 U.S. 69 (1885). Neither criterion was met in this case.

Whether or not Mr. Mincey's testimony at trial was inconsistent, his responses to the in-hospital interrogation failed to meet traditional standards of trustworthiness and voluntariness. The statements made in the intensive care unit of the hospital were the direct result of an overborne will. The circumstances under which the statements were made are undisputed. The interrogation began three or four hours after Mr. Mincey's admission to the hospital and following surgery. App. Page 43. He required the administration of resuscitative drugs. App. Page 82-83.

Upon admission, Mr. Mincey was almost to the point of coma. App. Page 82-83. At times during the interrogation, Mr. Mincey looked exhausted to his interrogator. App. Page 59. He had not slept for some time. App. Page 66. The interrogating officer testified that the interrogation lasted about an hour. App. Page 59. The officer's notes on the hospital paper Mr. Mincey used for

his answers indicate the interrogation lasted over three hours. When a person is fatigued, his will is more easily overborne. *Leyra v. Denno*, 347 U.S. 556, 560 (1954); *Cf., Ashcraft v. Tennessee*, 327 U.S. 274 (1946), 322 U.S. 143, 153-54 (1944).

The only sustenance that Mr. Mincey was receiving was through intravenous feeding. The lack of substantial food diminishes one's physical strength and ability to resist. *Cf., Davis v. North Carolina*, 384 U.S. 737, 746 (1966).

Mr. Mincey repeatedly expressed to Detective Hust his confusion and inability to recall accurately the facts of the shooting incident. App. Page 47-49, App. Br. Page 3, 4, 8, 9. He was not even sure whether the same person had conducted the various sessions of questioning. App. Page 92-93.

Mr. Mincey was being given oxygen through a "T-bar", a device generally used only for more critical patients. App. Page 65. He had a nasal gastric tube running from his nose to his stomach to prevent him from aspirating vomit, and was catheterized. App. Page 66-67. Mr. Mincey indicated that he was in pain and that the pain was unbearable. App. Page 48-49, App. Br. Page 7, 9. Such intense pain also diminishes the ability to resist. *Cf., Beecher v. Alabama*, 408 U.S. 234, 236 (1972); *Reck v. Pate*, 367 U.S. 433, 441-42 (1961); *Ziang Sung Wan v. United States*, 266 U.S. 1 (1924).

Mr. Mincey recalled that after he had been shot, a police officer stood over him yelling "move, nigger, move". App. Page 47, App. Br. Page 3. This initial abuse lent an atmosphere of intimidation to the stream of events which followed. *Cf., Beecher v. Alabama*, 408 U.S. 234, 236 (1972); *Clewis v. Texas*, 386 U.S. 707, 710 (1967). At least twice, Mr. Mincey made written requests that the questioning be discontinued, and requested the aid of counsel at least six times. The failure to inform a suspect of his right to counsel is a "significant factor" in determining the voluntariness of a statement. *E.g., Davis v. North Carolina*, 384 U.S. 737, 740 (1966). Even more intimidating is the effect of having one's requests for counsel and that questioning be stopped

repeatedly denied, frustrated or ignored. *Cf., Culombe v. Connecticut*, 367 U.S. 568 (1961).

The only persons who had access to Mr. Mincey were the police and hospital personnel. Nurse Graham, in whose hands Mr. Mincey's well being was entrusted, encouraged him to respond to Detective Hust's questioning. App. Page 65-66. Isolation from one's friends and from counsel has been consistently recognized by this Court as an important factor to be considered in determining voluntariness. *Cf., Sims v. Georgia*, 389 U.S. 404 (1967); *Haynes v. Washington*, 373 U.S. 503 (1963); *Fikes v. Alabama*, 352 U.S. 191 (1957); *Haley v. Ohio*, 332 U.S. 596, 598 (1948).

Mr. Mincey had received numerous drugs in an effort to stabilize his condition. Nurse Graham was unsure whether Mr. Mincey was under the influence of drugs at the time of the interrogation. Statements made under the influence of drugs do not meet traditional standards of voluntariness. *Cf., Townsend v. Sain*, 372 U.S. 293 (1963).

Mr. Mincey's lack of experience with the police is yet another factor to be considered in determining voluntariness. *Cf., Reck v. Pate*, 367 U.S. 433, 441 (1961); *Haley v. Ohio*, 332 U.S. 596 (1948).

Mr. Mincey was helpless. He could not walk away from the police officer or even turn his back on him. He could not even speak to tell him to leave. He could only communicate by laborious writing. His strength was sapped by serious injury and surgery. He was in pain, weak and confused. He asked for counsel and to be left alone, but no one complied; no one came to his aid, not even the one person he should have been able to turn to, his nurse. The questioning continued, unrelenting and without regard to his pleas to stop or for counsel. The police officer would not leave Mr. Mincey alone until he received the statements he was seeking.

Clearly, Mr. Mincey's will was overborne. The above-described factors cannot be considered circumstances assuring the voluntariness or trustworthiness of his statements.

It must be emphasized that all we can be sure of are Mr. Mincey's protestations and statements, since they were written out. There are no equally accurate records of what questions were asked. In fact, the lack of contemporaneous recording of what questions Mr. Mincey's answers were in response to renders the admission of his responses a denial of due process. *Cf., United States v. Shoupe*, 548 F.2d 636 (6th Cir. 1977).

It should also be noted that the trial court here never made a finding that the statements admitted against Mr. Mincey were voluntary, in contravention of *Jackson v. Denno*, 378 U.S. 368 (1964).

Since Mr. Mincey's hospital interrogation statements do not meet the test of *Harris*, they should have been suppressed.

CONCLUSION

For the foregoing reasons, Mr. Mincey respectfully urges that the judgment of the Supreme Court of the State of Arizona be reversed and that this Court hold that the admission at Mr. Mincey's trial of evidence obtained in the search of Mr. Mincey's residence and of evidence obtained in the in-hospital interrogation denied Mr. Mincey due process of law.

Respectfully submitted,

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APPENDIX

1

Elizabeth B. [illegible] RN
[illegible] 10/28/74 [illegible]
Arizona ~~[illegible]~~ Medical Center

Ph 7.44
36
102
95.3
24.2 40%

5 mg
40 [illegible]

A-26666

3283

[illegible] 10-28-74
2015

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ARIZONA MEDICAL CENTER
UNIVERSITY HOSPITAL

PROGRESS NOTES

11-28-74

20:15

I knew him for 2 Days
Dud with Board
Chuck
fair. He has A Ride at
the fair in South Bend

Every body knew Every body

I Remember some body standing over me saying nigger nigger nigger I was in the floor beside the bed

This is all I can say without A lawyer.

I'm going to have to put my head together. there are so many things that I don't remember. I. like how did they get into the apt.

Police
Dogan me Did he give me some money (no)
what do you call A sample
I CAN'T say without A lawyer

let me get my self together first.
You see im not for sure. every thing happened so fast. I can't answer at this time because I don't want to say.
but I can't say for sure.
Some questions aren't clear to me at the present time. This writing was more of a drawing of

talking because I could not TALK
At the time of the interview

If Its possible to get a Lawer
now. we can finish the talk.
He could direct me in the Right Direction
where as without a Lawyer I might
saw something thinking that it means something
else. is it still inside me
My Right Leg I can't use it
I can't even move it. The pain
is unbearable. I'll help you if I can.
do Every thing possible

My name is ~~AIC~~ Rufus J Mincey
AIC
100 Fais Davis Montham
Blks 4202 B 24.
3550 shop.

would you please Let
Some one Know where I
am.

3

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PROGRESS NOTES

I can't say. I have to see a Lawyer
I'm charged with murder so the
police man says. Where is Debra
I don't know who the police man was.
which one was the MAN?
Did he have on cowboy boots?
There are a lot of things that
aren't clear. Two guys arrested
the one with the beard.
John, who else
when Do we go to trial
You didn't see Any body else
No one saw Anybody else. IN
the Apt. We'll get it together.
Why. It's void I I don't sign
I hate to sign things in the Blind

This information was given
so that It might Bring this case to a end.
If ou Asked me some questions and
I answered to the best of my Ability
At the present time. This is not
to say I can't change my Information
At A later Date, Because I'm not
sure as of now

HUST

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FLOW SHEET

4 +++

[illegible] present [illegible] voluntarily. Signed [illegible]
Witness [illegible]
22:[illegible] 10-28-74 [illegible]

10 Barry [illegible] + his old lady went for a week to see [illegible]. chuck went. they came back and said chuck was in the car with 2 guys. and 1 the 2 guys came with chuck. so I got and when he came back all hell turned loose. when he came back a bust ~~[illegible]~~ took place. Bust you see I'm not for sure. People were all over the house. I couldn't figure out weather it was a bust or rip off. I have a gun in the house 380 it's place in particular I showed it to chuck and he showed me ~~[illegible]~~ his. Look like a 38 sp. Take to the car with him (he didn't take any drugs out of the apt) thats for sure. when he left by his self.

[signature]

5

I can sign this because I remember these things, not because [illegible] is talking same bullshit.

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UNIVERSITY HOSPITAL

I was present while the
above voluntarily wrote
this. Elizabeth ... Vrahomin
10-28-74 2320

FLOW SHEET

Thats why I have To have time to redo ~~the~~
every thing that happened in my mind

nobody answered Door with
gun.
John Didn't have A gun
you see that's something
on me. I was in the
Bed Room. Lets
Rap tomarrow. face to
face. I can't give facts
If something happens that
I don't know about. why
would Chuck give John
his gun. if he came
with the guy

Questions I need to
know
when I heard All the
noise I run out
to Check it out then
I went Back to the
Bed room. where was Chuck
I can't say for sure maby
the Guy had a Gun

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I was present while the
above voluntarily wrote
this. Elizabeth ... Vrahomin
10-28-74 2320

FLOW SHEET

If I don't Tell any Lies I don't
have to make things up to make
the Lie Look Like the truth. Let
John talk. All he can do is tell the
truth. or get Cought telling A Lie.
Same, Same. I want A good Lawyer.
I charged with murder thats bad
weather you did it or not. you Don't
have to prove you did something
you have to " " didn't

Ohd how many (bullets) came
through that Door.
what Time will you come tomarrow.
I'll be waiting I Don't have to Like
I want some Legal guidence
I can't talk now what good
is this doing. Every thing I have said
is the truch. There are A Lot of thing
Left out. After I get A Lawyer
you'll come. I wont Lie
my leg hurt I want to try to go to sleep.
Tell Deb That I miss her

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-5353

RUFUS JUNIOR MINCEY,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR THE RESPONDENT

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AUTHORITIES

IN THE

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OCTOBER TERM, 1977

NO. 77-5353

RUFUS JUNIOR MINCEY,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR THE RESPONDENT

SUMMARY OF ARGUMENTS

I.

(A) While, as a general rule, search warrants are required before conducting

a search, there are exceptions to this requirement. United States v. Edwards, 415 U.S. 800 (1974). In order for the exception to pass constitutional muster, it must meet a standard of reasonableness. And, in addition, the need of the public for the "Exception" must outweigh the Fourth Amendment interest of the individual.

The Arizona "Murder Scene Exception" meets both the tests of reasonableness and public need. Homicide is the ultimate of all crimes in a civilized society. Society is entitled to know at the earliest possible moment if, in fact, a homicide has taken place. Similarly, society has the right to see the responsible party held to answer for his act at the earliest possible moment. Arizona's "Murder Scene Exception" was created with this public interest in mind. In addition, the exception is founded on the principle of common sense. It seems only

logical that when police officers happen on a murder scene or location where a serious injury has occurred and foul play is suspected, they would be expected to take immediate steps to find out who was responsible for the deaths or serious injury. This necessarily includes an immediate and thorough investigation of the scene.

Arizona's "Exception" is not without safeguards. The Arizona Supreme Court has set out stringent guidelines which must be met before the rule applies. Secondly, a defendant has a prompt procedure for challenging any evidence which may have been seized during such a search.

Since the "Murder Scene Exception" only applies to a few limited situations, the evil of "general warrants" which was a basis for the Fourth Amendment is not present.

The Arizona "Rule" should not be considered a novel exception to the Fourth

Amendment. This Court has at least implicitly recognized the right of police officers to investigate the cry for help or the sound of a shot. McDonald v. United States, 335 U.S. 451 (1948). It is then only reasonable that they be allowed to conduct an investigation to determine why and who took the life of the person they find. In short, the Arizona "Exception" is needed for the protection of the public in order to ensure prompt resolution of incidents such as the one that occurred at Apartment 211. The exception is also based on a humanitarian demand that officers search the rest of the premises to see if there are any more injured.

(B) Even if this Court is unwilling to adopt the "Arizona Murder Scene Exception", the search of petitioner's apartment was still reasonable.

It is recognized that searches incident a lawful arrest are permissible without a

search warrant so long as the area of the search is within the immediate control or there is a danger evidence will be destroyed. Chimel v. California, 395 U.S. 752 (1969). The heroin found in the bedroom where petitioner was arrested was within his immediate control. The heroin in the bathroom was seized to prevent its destruction.

The search of petitioner's apartment after the shooting was reasonable and consistent within the dictates of common sense. During the midst of a lawful arrest a police officer was shot no less than 5 times. Approximately 8 minutes later a homicide detective -- Reyna -- arrived. He walked into a bullet riddled apartment. A critically injured officer was being taken to the hospital. Two more seriously injured people remained. There was blood in the hallway, on a chair, desk and rug. Some was still wet.

Reyna did what any other reasonable person would have done under the circumstances. He began an immediate investigation to find out what had happened and who was responsible. To have done otherwise, Reyna would have ignored the right of society to have the party responsible for the violent acts at apartment 211 brought to justice at the earliest possible moment.

II

The prosecutor properly cross-examined petitioner concerning two prior statements he wrote to a police officer during his recovery in the hospital. These statements were sufficiently inconsistent with his testimony on direct examination to warrant their use for impeachment under Harris v. New York, 401 U.S. 222 (1971) and Oregon v. Hass, 420 U.S. 714 (1975). Further, from the totality of the circumstances as reflected in the record before the Court,

it is plain that petitioner's prior inconsistent statements were neither coerced nor involuntary.

(A) Harris v. New York, supra, and Oregon v. Hass, supra, require no greater degree of inconsistency for impeachment with prior statements taken in violation of Miranda v. Arizona, 384 U.S. 436 (1966) than is required under traditional principles of evidence. Under those principles a witness' statement may be used to impeach his testimony if its implications tend in a different direction from the testimony or if its overall effect is to undermine the witness' sincerity by suggesting that at an earlier time he held a different belief from that which apparently actuates his testimony. 3A Wigmore on Evidence § 1040 (Chadbourne Ed. 1970); Commonwealth v. Pickles, 364 Mass. 395, 305 N.E.2d 107 (1973). Here petitioner testified at trial that

Officer Headricks had a gun when he entered petitioner's bedroom. To impeach this testimony the prosecutor established on cross-examination that petitioner earlier stated he was not sure "the guy" who came into the bedroom had a gun. Petitioner also testified he did not know Officer Headricks was a police officer or that he was being arrested. As impeachment, the prosecutor established on cross-examination that petitioner had earlier characterized the armed intrusion as a "bust". Both prior statements suggested petitioner had once had perceptions different from those to which he testified. The prior statements were hence sufficiently inconsistent to impeach his testimony under Harris v. New York, supra, and Oregon v. Hass, supra.

Further, the prosecutor was not required to give petitioner an advance opportunity to explain the prior inconsistent statements

as a precondition to cross-examining him about them.

(B) The totality of the circumstances utterly fail to demonstrate that petitioner's prior inconsistent statements were the product of an overborne will. Procunier v. Atchley, 400 U.S. 446 (1971). The lurid picture of coercive influences painted by petitioner is founded not upon substantial evidence in the record, but rather upon imaginative speculation from outward appearances. An analysis of the evidence shows that petitioner was not in fact subject to lowered resistance or special susceptibility to pressure by the officer who interviewed him. The evidence also demonstrates that the officer scrupulously refrained from employing physical or mental duress or abuse or any other coercive techniques. Finally, the evidence affirmatively shows that petitioner voluntarily cooperated with the officer's questioning

and attempted to aid him in his investigation. Petitioner's prior inconsistent statements were neither coerced nor involuntary.

For citations to portion of record not appearing in Appendix, the following abbreviations will be used:

Trial Transcript (T.T._____);
Grand Jury Transcript (G.J.T._____);
Hearing Transcript January 31, 1975 (H.T.J._____);
Hearing Transcript February 3 and 4, 1975 (H.T.F._____).

Respondent also has attached in the Appendix to this brief:

1. State's Exhibit 2 which is Detective Hust's reconstruction of petitioner's statement at the hospital;

2. Defendant s Exhibit D which is the handwritten answers of petitioner that were made in response to Hust's questions;

3. An excerpt on the definition and characteristics of Narcan from the Physician's Desk Reference, Medical Economics Company, 1974 Edition.

4. Violent Crime Statistics from the Federal Bureau of Investigation, Crime in the United States, 1974 (Uniform Crime Reports) (1975) and (1976).

5. Omnibus hearing forms numbers 20 and 16 from 17 Ariz.Rev.Stat.Ann. (1973) and 1975.

STATEMENT OF THE CASE

Arrest of Petitioner and Search of Petitioner's Apartment

The facts giving rise to the incident, which is the subject of this petition, arose out of an illicit drug transaction termed a "buy-bust".[1] During a raid following the drug transaction, Officer Barry Headricks of the Tucson Police Department,

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[1] A "buy-bust" occurs when the undercover agent or agents make contact with a person who allegedly has illegal drugs for sale and make an offer to buy. If the agent sees the drugs or has enough information to be sure that the person does have the drugs, then an arrest is made. The plan is for the agent to leave momentarily and then return with a number of agents to make the arrests. The usual plan is for the original undercover agent to get the door open by using his undercover identity. Then the rest of the agents rush in.

[H.T.J. at 141; H.T.F. at 4; T.T., May 27, 1975 at 186; see State v. Mincey, 115 Ariz. 472, 566 P.2d 273, 276, footnote 1 (1977).]

METRO[2] squad, was shot and killed by petitioner. (T.T., June 5, 1975 at 163, 166-167; T.T., May 27, 1975 at 76.) The sequence of events are as follows. At about 12:45 a.m. on October 28, 1974, Lieutenant Fuller, Commander of the METRO division, received a call from Officer Headricks requesting a meeting to discuss the case which is now the subject of this petition. The two met at Sambo's Restaurant. (T.T., May 27, 1975 at 182-84.)

After meeting with Headrick's, Fuller made arrangements for other members of the METRO division to meet at an off-base headquarters referred to as a "Pad".[3]

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[2] METRO is the letter designation for Metropolitan Area Narcotics Squad which investigates narcotics and dangerous drug crimes throughout Pima County. (App. at 23; T.T., May 27, 1975 at 29-30.)

[3] A "Pad" is a base of operations located separate and apart from the regular police station where undercover narcotics agents can meet without fear of being identified or recognized as police officers because they are seen at a police station. (T.T., May 27, 1975 at 40-41.)

(T.T., May 27, 1975 at 185.) At 2:00 p.m., other members of the METRO division met at the "Pad". At this time, it was determined that they would effectuate the arrest of the suspect by means of a "buy-bust", see footnote 1, supra. (T.T., May 27, 1975 at 186.) That is, Officer Headricks would initially go into the apartment and indicate a desire to purchase heroin. He would also indicate that a second party was waiting in the car with the money. If the suspect showed Headricks a substance represented to be heroin, Headricks would run a field test to determine whether or not the substance was in fact heroin. If the test was positive, Headricks would tell the suspect that he wanted the heroin, but first he would have to go to his car for the money. Headricks would return to the apartment with other narcotics agents who would wait

until Headricks had gained entry. Then, they would enter the apartment and assist him in arresting the suspect. (H.T.J. at 141, 149.) Headricks had a listening device placed on his person so that his fellow officers could hear what transpired during Headricks' initial entry into the apartment. (H.T.J. at 158-59; T.T., May 27, 1975 at 34-35.)

After the meeting, five vehicles, including that of Officer Headricks, met at the Colony Apartments. Each vehicle contained two officers with the exception of Fuller's car which, in addition to Detective Wolf, carried a deputy county attorney.[4] (T.T., May 27, 1975 at 186-88.)

The officers arrived at the Colony Apartments between 2:40-2:45 p.m. (T.T., May 27, 1975 at 41-42, 188.) The Colony

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[4] The county attorney was an observer only. He gave no advice as to the operation of the "buy-bust". (App. at 22; H.T.J. at 138.)

Apartments has more than one story.[5] The hallways of the apartment are enclosed. Officer Schwarz described the hall as "looking like a tunnel". (T.T., May 27, 1975 at 53.) The doors to the apartments are recessed back from the hall. Looking down the hall one observes "recesses" and not doors. (T.T., May 27, 1975 at 200.) The doors to the apartments do not face the hall but instead look directly toward another apartment door. In other words, the doors to Apartments 211 and 212 face each other in an alcove off the hallway. (T.T., June 9, 1975 at 554.) The door to Apartment 213 is in another alcove directly across the hall. (H.T.J. at 81.) The alcove is 4 to 6 feet wide. (T.T., May 28, 1975 at 107.) The hallways are described

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[5] This can be inferred from the testimony which indicates that the officers went up the steps to the second floor to reach petitioner's apartment, number 211. (T.T., May 27, 1975 at 53.)

as being 6 or 7 feet wide. (T.T., June 5, 1975 at 73.)

Officer Headricks was accompanied to the apartments by Officer Schwarz. Schwarz was designated Headricks' money man, that is, the person holding the money for Headricks. (T.T., May 27, 1975 at 36.) When Headricks and Schwarz arrived at the Colony, they parked in the parking lot on the west side of the apartments in the "furthest Northwest parking slot" in the lot. (T.T., May 27, 1975 at 188.) Their car was facing east toward the Colony Apartments. (H.T.F. at 6.) Headricks saw the informant and got out of the car. He walked away from the car in an easterly direction toward the apartments. It was then approximately 2:50-2:55 p.m. (T.T., May 27, 1975 at 51.) Schwarz was monitoring Headricks' activities. (T.T., May 27, 1975 at 48.) However, after a short time Schwarz was only able to hear static on

the radio monitor. This can occur when the transmitter is taken into a building. (T.T., May 27, 1975 at 48-49.)

Shortly after Headricks left the car, Schwarz observed an individual,[6] whom he had seen earlier with a female companion, jog along the north side of the apartments looking in all directions. Hodgman suddenly darted into a west alcove of the apartments. (H.T.F. at 6; T.T., May 27, 1975 at 50.) When Schwarz lost sight of Hodgman, he looked south and saw Headricks walking toward their car. (T.T., May 27, 1975 at 51-52.) When Headricks got to the car, he told Schwarz that he had seen the "dope" and that it

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[6] This person was identified as John Hodgman. (T.T. May 27, 1975 at 50.

looked good.[7] He went on to say that there was "a white guy and a black dude and a white chick in the apartment and that the white guy had a gun". (T.T., May 27, 1975 at 53.) Headricks said they were in apartment 211 (T.T., May 27, 1975 at 52) which was on the south side of the building.[8] It was later determined that

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[7] Fuller testified that he heard Headricks on the monitor discussing the Marquis field test (H.T.J. at 172) which he was performing in the apartment to determine whether the substance offered for sale was in fact heroin. Headricks had stated over the monitor that the test results were purple indicating they were dealing with "good dope". (H.T.J. at 161.)

[8] This can be inferred from the fact that Schwarz testified that he observed Fuller parking in the south parking lot as he and Headricks were entering the apartments immediately before the raid. (T.T., May 27, 1975 at 53.) Fuller testified that he had parked his car directly under the balcony of apartment 211. (T.T., May 27, 1975 at 195.)

apartment 211 was being rented by petitioner and Debra Mincey on October 28, 1974. (T.T., May 28, 1975 at 169.) The other units (T.T., May 27, 1975 at 194-95) with the exception of one, were monitoring Headricks' activities. (T.T., May 27, 1975 at 199.) Fuller then ordered the units to move toward the apartments. (T.T., May 27, 1975 at 194-95.) Schwarz and Headricks met Fuller, Sergeant Wolf and Deputy County Attorney Cochran at a stairway at the southwest corner of the apartment. (T.T., May 27, 1975 at 53.)

The five walked up to the second floor, entered the hallway and proceeded east (T.T., May 28, 1975 at 181-82) down the hall toward apartment 211. (T.T., May 27, 1975 at 196.) At about the same time, Officers Skuta, Anaya, Wright and Morgan started down the other end of the hallway going west toward 211. (T.T., May 27, 1975 at 143-44.) The hallway was about

one half a block long. (T.T., May 27, 1975 at 55.)

When they reached apartment 211, Headricks went to the door. Schwarz was behind Headricks and to his left. (H.T.J. at 165.) Fuller had his back to the wall looking around the corner at Schwarz and Headricks. (T.T., May 27, 1975 at 202.) Officer Wolf and Deputy County Attorney Cochran were behind Fuller and were "flattened" against the hall (T.T., May 27, 1975 at 201-02) with Cochran in the rear. (T.T., May 28, 1975 at 182.) The other officers were in the alcove of the apartment next to apartment 211. (T.T., May 27, 1975 at 144.)

Headricks knocked on the door. It was opened by Hodgman whom they had seen earlier. Headricks started in the door and said something with the word "police" in it. (T.T., May 27, 1975 at 56.) Headricks got half to three-fourths through

the door when Hodgman tried to slam the door. (T.T., May 27, 1975 at 57.) Headricks slipped into the apartment. (T.T., May 28, 1975 at 5.) Schwarz threw his arm between the door and the door jamb preventing the door from closing. (T.T., May 27, 1975 at 56-57.) Fuller hit Schwarz in the back and Anaya shoved Fuller. As the door started to open Schwarz yelled "police officers". (H.T.F. at 57; T.T., May 27, 1975 at 146.) Hodgman was knocked back into the wall. As Schwarz was wrestling with Hodgman, Fuller ran into the apartment. (T.T., May 27, 1975 at 57.)

When Fuller gained entry into the apartment, he saw a subject, later identified as Charles Ferguson standing across the living room in the hallway near the bedroom and bathroom doors. Fuller went to Ferguson and pushed him against the wall. Almost immediately Fuller heard the bedroom door, which was to his right, slam shut.

Next Fuller heard shots. The first shot fired sounded like a "pop".[9] (T.T. May 28, 1975 at 186.) Fuller moved along the outside bedroom toward the door with Ferguson in front of him. They were "nose to nose", only four inches apart. As they were nearing the door, a bullet came through the wall striking Ferguson in the head. More shots were fired. The bedroom door opened and Headricks came out and walked toward the living room and went down on the floor. (T.T., May 28, 1975 at 6-7.) Blood was gushing out of Headricks' mouth and nose.

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[9] Two different weapons were being fired. (T.T., May 28, 1975 at 16, 17, 186; T.T., June 4, 1975 at 41.) Some of the shots were described as soft (T.T., May 27, 1975 at 65), or like "pop-pop" (T.T., June 4, 1975 at 41) and the others were described as louder (T.T., May 28, 1975 at 188; T.T., May 27, 1975 at 65.) Officer Reyna test fired the two weapons that had been fired at the scene. Headricks' pistol sounded like a boom. Petitioner's .380 automatic (T.T., June 6, 1975 at 272) sounded like a sharp crack. (T.T., May 30, 1975 at 51.)

Schwarz began to administer first aid. He rolled Headricks over, ripped his shirt open and saw what appeared to be two bullet wounds in his back. (T.T., May 27, 1975 at 68-70.)

Fuller entered the bedroom and found in the closet a female shot in the hip and forearm.[10] (T.T., May 28, 1975 at 15.) Fuller then climbed up on the bed, went across it and found petitioner lying on his back behind the bed. Fuller spoke and prodded petitioner with his pistol but got no reaction. Directly under petitioner's hand was an automatic pistol. Detective Anaya came across the bed, picked up the pistol and placed it on the bed. (T.T., May 28, 1975 at 7-9.) The officers started to move petitioner until they saw blood under him. At that point, they left petitioner where he was. Fuller checked to see if "everyone was secure" and whether rescue

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[10] She was later identified as Debra Johnson. (T.T., June 3, 1975 at 28-29.)

and an ambulance had been called. Then, he instructed his men not to do any further investigation until they were relieved. This was consistent with departmental policy which prohibited the officers who are involved in a situation as described above from investigating their own actions. (App. at 7; T.T. May 28, 1975 at 16, 29.) The aforementioned forced entry occurred at about 3:20 p.m. (T.T., June 9, 1975 at 556) and the gun battle was over in a matter of seconds. (T.T., May 27, 1975 at 115-16.) Thirteen shots were fired. (G.J.T. at 63-64.) Fuller turned the scene over to Lieutenant Ronstadt, the on-duty force commander and Fuller's men did not take any further part in the investigation at Colony Apartments. (T.T., May 28, 1977 at 29.) Detective Reyna of the Tucson Police Department homicide detail arrived at the Colony Apartments at 3:28-3:30 p.m. (App. at 32; H.T.F. at 105-06.)

He had learned of the shooting over the radio and in response thereto went to the scene. (App. at 32; H.T.F. at 106.) Reyna was assigned "the scene investigation". (App. at 33; H.T.F. at 107.) Debra Johnson[11] and Charles Ferguson,[12] were still in the apartment when Reyna arrived. (H.T.F. at 123; App. at 35; T.T., May 29, 1975 at 23.) Reyna also relieved the officer who was guarding the petitioner. (T.T., May 29, 1975 at 22.)

Reyna began his investigation even before Hodgman and Greenwalt, who had been placed under arrest, were removed from the scene. (App. at 35; H.T.F. at 113.) Reyna had the apartment photographed and diagramed.

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[11] Johnson had a hip (T.T., May 29, 1975 at 23), and an arm wound. (T.T., May 29, 1975 at 25; T.T., June 3, 1975 at 28-29.) She appeared to be seriously injured. (H.T.F. at 125.)

[12] Ferguson had a head wound. (T.T., May 29, 1975 at 25.)

He had the evidence tagged indicating its location in the apartment. (App. 34-35; H.T.F. at 112-13.) Not only was Reyna looking for narcotics paraphernalia because the shootings were allegedly the result of a drug transaction (App. at 36; H.T.F. at 114), but he was also looking for anything that might assist in the reconstruction of the crime or for any instrumentality or products of the crime. (H.T.F. at 147.)

In addition to finding three wounded people at the apartment, there were other obvious signs to indicate that a violent struggle had just taken place. There was blood in the hallway. (H.T.F. at 115.) There were bullet holes in the hallway and bedroom walls. (H.T.F. at 116.) The window in the living room was shattered. (H.T.F. at 117.) Reyna observed shell casings and a live bullet in the bedroom. (H.T.F. at 116.) There were blood stains

on a chair, on a desk, on the wall outside the bedroom and on the rug. (H.T.F. at 118.) Some of the blood was still wet when Reyna made his initial entrance into the apartment. (T.T., May 29, 1975 at 79.) Headricks died at somewhere around 4:00 p.m. on October 24, 1974.[13]

Reyna's investigation of the murder scene can be broken down into at least four periods: (1) the first investigation began on October 28, 1974, with his arrival

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[13] Officer Schwarz arrived at the University Hospital somewhere around 3:45 p.m. (T.T., May 27, 1975 at 75.) He stayed at the hospital for twenty minutes. (T.T., May 27, 1975 at 76.) When Headricks died, Officer Hust told Officer Schwarz to notify the station. Hust notified Sergeant Bunting by radio of Headricks' death. (App. at 42; H.T.F. at 154.) At that point, petitioner's counsel stipulated that Headricks died at the University Hospital. (T.T., May 27, 1975 at 76.) From this, one can infer that Headricks was dead when Schwarz left the hospital.

at the apartment at 3:28 p.m. and lasted until the early hours of October 29, 1974 (App. at 37; H.T.F. at 141-42); (2) the second period began at about 9:00 a.m. on October 29, 1974 (H.T.F. at 145);[14] (3) the third period began in November, 1974, when Reyna went to the apartment at the request of apartment management to inventory petitioner's belongings that remained in the apartment. The items were placed in police property (H.T.F. at 145-46); and (4) the fourth began when the apartment was rented by the County Attorney's Office.[15]

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[14] Periods one and two lasted, at least, for three or four days. (H.T.F. at 141.) Reyna did testify that he had done work up until a month before the suppression hearing (App. at 37; H.T.F. at 140-41); that particular testimony of Reyna was given on February 3, 1975.

[15] The County Attorney's Office rented the apartment on April 3, 1975. (T.T. May 30, 1975 at 32.) On October 15, petitioner had informed the manager of the Colony Apartments that he would be moving out of his apartment, number 211 (T.T. May 28, 1975 at 169) at the end of October, 1974. (T.T. May 28, 1975 at 172, 173.)

During the first segment of the investigation measurements were taken, photographs were taken, and the spent cartridges and lead fragments were taken into custody with the exception of the one found in the glass fragments in the living room and the one dug out of the wall. (H.T.F. at 144-45.) The narcotics and narcotics paraphernalia were seized during the first segment. (H.T.F. at 150.)[16] If the items were not removed they were at least seized. (App.

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[16] A syringe was found in the bedroom. (App. at 81; T.T. May 29, 1975 at 129.) A military fatigue shirt or jacket was also found in the bedroom. One of the jacket pockets contained a wallet, inside of which was found identification belonging to petitioner. (App. at 78-79; T.T. May 29, 1975 at 71, 87-88.) In the same pocket 14 papers containing a white or grayish powder were found. (App. at 79; T.T. May 29, 1975 at 88.) [The white powder was later determined to be heroin. (T.T. June 3, 1975 at 160-62.)] The pocket also contained a hollow metal tube, a toilet roll holder, in which two papers of aluminum foil containing a powdery substance were found. [The powder was later determined to be heroin. (T.T. June 3, 1975 at 162-63.)] In the bathroom the officer found a long piece of surgical tubing, which had been cut in

at 40; H.T.F. at 148.)

In the second segment lead fragments were removed from the wall and another fragment was found in the debris on the balcony.[17] (App. at 39; H.T.F. at 144-45.)

The third segment involved the inventorying of the items remaining in the apartment that belonged to petitioner upon the request of the manager of Colony Apartments. The items were placed in police property. (H.T.F. at 146.)

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half, syringe caps, a metal spoon, and a plate holding a small bottle containing a white powdery substance. (T.T., May 29, 1975 at 128-30.) [The powder was later determined to be heroin. (T.T., June 3, 1975 at 153-55.)] A small bottle of cocaine was also found in the apartment. (H.T.F. at 119.) However, this was not the subject of any of the charges herein.

[17] Reyna testified there were officers on the scene 24 hours until ". . . we terminated the investigation". (App. at 38; H.T.F. at 143.) It would seem he is referring to the first two segments of his investigation.

The fourth segment was used to prepare the model used at trial for demonstrative purposes. The model was used to plot the projectory of the bullets. (T.T., May 30, 1975 at 28-30.) Headricks' shots went into the south wall. One of petitioner's shots went in a northeast direction. The remainder went in the north wall.

While the investigation was in progress back at the apartment, petitioner was taken to the University Hospital. (H.T.F. at 193.) Officer Hust arrived at the hospital after spending five minutes at the murder scene. (App. at 41; H.T.F. at 153.) Hust was asked to remove the handcuffs from the suspects who were brought from the scene. (App. at 42; H.T.F. at 155.)[18]

Approximately three or four hours later that evening, Detective Hust sought to interview petitioner. (App. 43-44;

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[18] The wounded were removed within two minutes of Reyna's arrival at the apartments. (T.T., May 29, 1975 at 26.)

H.T.F. at 155-58.) Before doing so Detective Hust obtained permission from a Dr. Farrel. Hust also testified that the nurses "checked with somebody to get it authorized". (App. 50; H.T.F. at 170.) Detective Hust found petitioner in the intensive care unit. At the time several doctors and nurses were in the area; and Elizabeth Graham, petitioner's nurse, was at his bedside. (App. 44; H.T.F. at 157.) Detective Hust observed that petitioner was being fed intravenously and had a tube down his throat, but did not recall whether his eyes were open or closed when he entered. (App. 44; H.T.F. at 158.)

Because of the tube in his throat petitioner was unable to speak to Detective Hust. (App. 45; H.T.F. at 160.) He therefore responded to Detective Hust's questions by writing or printing notes on hospital paper. (Defendant's Exhibit D, App. 55, H.T.F. at 179; App. 45-46; H.T.F. at 160-61.) Detective Hust did not record his interview with petitioner or take contemporaneous notes. (App. 45; H.T.F.

at 159.) On the morning following the interview, however, Detective Hust interlineated some brief notes on Defendant's Exhibit D with a blue pen concerning the questions he had asked and petitioner's responses. (App. 55; H.T.F. at 179.) Later the same day or immediately on the following day, Detective Hust wrote down his recollection of the complete questions he had asked. (App. 56; H.T.F. at 179.) These were later incorporated into Detective Hust's police report of November 4, 1974. (State's Exhibit 2, see Respondent's Brief Appendix, App. 51, 55; H.T.F. at 171-72, 179.)[19]

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[19] Instead of having Detective Hust attempt to refresh his memory as to each question he had asked, defense counsel and the prosecutor stipulated that as to the substance of each such question Detective Hust would testify as shown in State's Exhibit 2. (App. 57-58; H.T.F. at 182-83.) Under the stipulation the trial court was to consider only that part of State's Exhibit 2 in which the questions and answers appear. (Middle of page 2 through bottom of page 7.) (App. 58; H.T.F. at 183.) At page 58 of the Appendix (H.T.F. at 183), the prosecutor erroneously referred to State's Exhibit 2 as "State's D".

Detective Hust first asked petitioner for information about Chuck Ferguson, who had also been wounded at petitioner's apartment. (App. 46-47, 50; H.T.F. 162-63, 169.) He then told petitioner he was under arrest for the murder of a police officer, and advised him of his constitutional rights as follows:

> "Q. Will you read it now as you read it then for Mr. Mincey.
>
> "A. You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to the presence of an attorney to assist you prior to questioning if you so desire. If you cannot afford an attorney, you have the right to have an attorney appointed for you prior to questioning. Do you understand these rights -- his response was an affirmative head shake -- now having been advised of these rights, will you answer my questions? -- Again being another affirmative head shake."

(App. 50; H.T.F. at 169-170. See App. 48; H.T.F. at 165.)

Detective Hust's subsequent questioning of petitioner took place in three distinct segments interspersed by treatment and rest periods. (App. 59-60; H.T.F. at 186-87.) As reconstructed from State's Exhibit 2 and Defendant's Exhibit D, see Appendix, the interview was substantially as follows:

> "Q. Do you know a guy named CHUCK who was shot in the head? I advised him he was in serious condition.
>
> "Mincey: I knew him for two days.
>
> "Q. Do you know his name?
>
> "Mincey: Dude with the beard?
>
> "Q. Yes, I think so.
>
> "Mincey: CHUCK.
>
> "Q. Do you know his last name or where he lives?
>
> "Mincey: FAIR.
>
> "Q. He lives on FAIR?
>
> "Mincey: He has a ride at the fair in SOUTH TUCSON.

"Q. Who can we get hold of that knows him?

"Mincey: Everybody know everybody.

"HUST: I then proceeded to advise him of his constitutional rights, also advised him that he was under arrest and charged with killing a police officer. I then went on to question him. What do you remember that happened?

"Mincey: I remember somebody standing over me saying 'Move, nigger, move.' I was on the floor beside the bed.

"HUST: Do you remember shooting anyone or firing a gun?

"Mincey: This is all I can say without a lawyer.

"HUST: If you want a lawyer now, I cannot talk to you any longer, however, you don't have to answer any questions you don't want to. Do you still want to talk to me?

"Mincey: (Shook his head in an affirmative manner)

"HUST: What else can you remember?

"MINCEY: I'm gonna have to put my head together. There are so many things that I don't remember I like how did they get into the apartment?

"HUST: How did who get into the apartment?

"MINCEY: Police.

"HUST: Did you sell some narcotics to the guy that was shot?

"MINCEY: Do you me, (sic) did he give me some money?

"HUST: Yes.

"MINCEY: No.

"HUST: Did you give him a sample?

"MINCEY: What do you call a sample?

"HUST: A small amount of drug or narcotic to test?

"MINCEY: I can't say without a lawyer.

"HUST: Did anyone say police or narcs when they came into the apartment?

"MINCEY: Let me get myself together first. You see, I'm notfare (sic) sure everything happened so fast. I can't answer at this time because I don't think so, but I can't say for sure. Some questions aren't clear to me at the present time.

"HUST: Did you shoot anyone?

"MINCEY: I can't say, I have to see a lawyer.

"HUST: Okay, I explained before about an attorney and that you don't have to talk if you don't want to. You can also refuse to answer any individual questions. Are you still willing to talk to me without an attorney present?

"MINCEY: (head shake yes)

"HUST: Do you know what you are charged with?

"MINCEY: I am charged with murder, so the policeman says.

"HUST: Yes, that's right.

"MINCEY: Where is DEBRA?

"HUST: She is in She's in the (sic) hospital. She is shot, but she will be alright.(sic) Do you know which one the policeman was?

"MINCEY: I don't know who the policeman was. Which one was the narc?

"HUST: He was the one who took the sample or made a buy and then later came in the bedroom.

"MINCEY: Did he have one (sic) cowboy boots?

"HUST: Yes.

"MINCEY: There are a lot of things that aren't clear.

"HUST: We arrested two other guys.

"MINCEY: Two guys arrested?

"HUST: Yes.

"MINCEY: The one with the beard?

"HUST: Yea and JOHN.

"MINCEY: JOHN who else?

"HUST: DEBBIE and some 16 year old girl.

"MINCEY: When do we go to trial?

"HUST: It will be awhile, first you have to get out here (sic).

"MINCEY: You didn't see anyone else, anybody else?

"HUST: I wasn't there when this happened.

"MINCEY: No one saw anybody else?

"HUST: Where?

"MINCEY: In the apartment.

"HUST: I don't know, but I don't think so. Was there supposed to be someone else?

"MINCEY: We'll get it together.

"HUST: Who is 'we'?

"MINCEY: (points to both myself and him)

"HUST: Will you sign your name on this and write that it was

voluntary and that you didn't want an attorney present.

"MINCEY: Why?

"HUST: To show it was voluntary and you gave it and you didn't want an attorney present.

"MINCEY: It's void, I I (sic) don't sign.

"HUST: No, it's not void your nurse and I and MR. SHARP witnessed it.

"MINCEY: I hate to sign things in the bline. (sic) This information was given so that it might bring this case to an end.

"MINCEY then wrote out something and made me print my name next to it. The question wrote is, you asked me some questions, and I answered to the best of my ability at the present time. This is not to say I can't change my information at a later date because I'm not sure as of now. At that time I printed my name in the space he left blank on the side. MINCEY also wrote a note and this continued from the bottom of page two it will be (sic);

"MINCEY: This writing was used a means of talking because I could not talk at the time of the interview.

"HUST: Is there anything else you want to tell us?

"MINCEY: If it is possible to get a lawyer now, we can finish the talk.

"HUST: (He could direct me in the right direction whereas without a lawyer I might saw (sic) something thinking it means something else. I leave now and let you get some rest.

"MINCEY: Is it still inside me?

"HUST: I don't know.

"MINCEY: My right leg, I can't use it. I can't even move it the pain is unbearable.

"HUST: In a couple days, you'll feel better.

"MINCEY: I'll help you if I can or everyway possible.

"MINCEY also then wrote a note on the bottom my name is Sgt. and then crossed that out and then wrote AIC RUFUS J. MINCEY, 100 FMS DAVIS MONTHAN BLKS. 4202B24 3550 and then shop. Also wrote a note Would you please let someone know where I am. HUST: responded yes, don't worry we'll let them know and have them contact someone for you. This was the end of the first interview at 2015 hours, 28 OCTOBER 1974.

"Second interview with RUFUS MINCEY.

"HUST: RUFUS, I just talked with SGT. BUNTING and he said they had JOHN downtown and he was talking. Is there anything else you want to tell us about everyone leaving the apartment or following the guy that made the buy out of the apartment. Did JOHN and his girlfriend leave the apartment for a walk?

"MINCEY: Nobody knew JOHN and his old lady went for a walk to see where CHUCK went. They came back and said CHUCK was in the car with two guys. One of the guys came with CHUCK. He left and when he came back all hell broke loose.

"HUST: What do you mean 'all hell broke loose.'?

"MINCEY: When he came back a bust took place.

"HUST: A what took place? I can't read that word.

"MINCEY: BUST, bust.

"HUST: Do you know it was a bust?

"MINCEY: You see, I'm not sure. People were all over the house. I couldn't figure out whether it was a bust or rip off.

"HUST: Did you have a gun in the house, or do you own a gun?

"MINCEY: I have a gun in the house.

"HUST: What kind?

"MINCEY: 380.

"HUST: Where do you keep it in the house?

"MINCEY: No place in particular. I showed it to CHUCK and he showed me his.

"HUST: What kind of a gun did CHUCK have?

"MINCEY: Looked like a 38 SP.

"HUST: When this guy left the house, did he take any narcotics with him to his car?

"MINCEY: Take to the car with him?

"HUST: Yeah, did he leave with drugs or narcotics.

"MINCEY: He didn't take any drugs out of the apartment, that's for sure.

"HUST: Who did he leave the house with?

"MINCEY: When he left?

"HUST: Yes.

"MINCEY: By his self. (MINCEY signs the paper RUFUS J. MINCEY. Underneath he said 'I can sign this because I remember these things, not because JOHN is talking some bull shit.'

"This interview was terminated at 2230 hours on 10-28-74. Another interview at 2255 hours on 10-28-74.

"HUST: RUFUS, I have a few more questions. I don't think your (sic) telling us everything.

"MINCEY: That's why I have to have time to redo everthing (sic) that happened in my mind.

"HUST: Who answered the door with the gun?

"MINCEY: Nobody answered the door with gun.

"HUST: Did JOHN answer the door with a gun?

"MINCEY: JOHN didn't have a gun.

"HUST: Yes, he did. CHUCK gave him his gun.

"MINCEY: You see, that's something on me. I was in the bedroom. Let's rap tomorrow, face to face. I can't give facts.

"HUST: I think you can give facts.

"MINCEY: If something happens that I don't know about why would

CHUCK give JOHN his gun if he came with the guy?

"HUST: I don't know.

"MINCEY. Wrote questions I need to know.

"HUST: Go ahead.

"MINCEY: When I heard all the noise, I run out to check it out. Then I went back to the bedroom

"HUST: Where was CHUCK?

"MINCEY: Where was CHUCK?

"HUST: Yes.

"MINCEY: (MINCEY shrugged his shoulders in a manner of I don't know.)

"HUST: Did this guy that came into the bedroom have a gun?

"MINCEY: I can't say for sure. maybe the guy had a gun.

"HUST: I would rather you stop talking to me than lie to me. If your (sic) telling the truth your story will be the same as JOHN'S and the others.

"MINCEY: If I don't tell any lies I don't have to make things up to make the lie look like the truth. Let JOHN talk, all he can do is tell the truth or caught telling a lie. Same, same. I want a good lawyer, I'm charged

with murder, that's bad whether you did it or not. You don't have to prove you did something. You have to prove you didn't.

"HUST: You wrong about that, we have to prove you did do something.

"MINCEY: How many dudes came through that door?

"HUST: Dudes?

"MINCEY (Circled dudes)

"HUST: Do you mean cops?

"MINCEY: (Shook his head Yes in an affirmative manner)

"HUST: I heard ten. Get some rest, I'll talk to you tomorrow when you can get that tube out.

"MINCEY: What time will you come tomorrow.

"HUST: Sometime in the morning.

"MINCEY: I'll be waiting. I don't have to like. I want some legal guidance.

"HUST: I'll tell you what an attorney will say. He'll tell you to keep your mouth shut.

"MINCEY: I can't talk now. What good is this doing? Everybody (sic) I have said is the truth. There are a lot of things left out. After I get a lawyer, you'll come.

"HUST: Yeah, I'll come.

"MINCEY: I won't lie.

"HUST: Get some rest, I'll see you later.

"MINCEY: My leg hurt, I want to try to go to sleep.

"HUST: Okay.

"MINCEY: Tell DEBBIE that I miss her.

"HUST. Okay."

Detective Hust testified petitioner made responses that seemed for the most part appropriate to his questions. (App. 51; H.T.F. at 170-71.) Detective Hust made no threats or promises during the interview and exerted no physical or mental force or coercion. (App. 58-59; H.T.F. at 184-85.) Petitioner was conscious throughout the interview. (App. 58; H.T.F. at 184.) Further, except for mentioning a lawyer on numerous occasions, petitioner never told Detective Hust he did not wish to talk to him, and, in fact, asked him to return and talk to

him again. (App. 58; H.T.F. at 184, 191.)

Elizabeth Graham, petitioner's nurse, testified it was she who had admitted petitioner to the intensive care unit. (App. 62-66; H.T.F. at 193, 203.) She testified he was awake at that time and never went to sleep as long as she took care of him that evening. (App. 66; H.T.F. at 204.) In her opinion petitioner was not in critical condition because his vital signs were stable and he was awake. (App. 64; H.T.F. at 198.) He had no head injuries. (App. 63; H.T.F. at 196.) Mrs. Graham stated the purpose of the intertrach tube that had been placed in his throat was to give him added oxygen as a precautionary measure. (App. at 64-65; H.T.F. at 198.) Petitioner was breathing normally and on his own. (App. 64; H.T.F. at 198-99.) Petitioner also had a nasal gastric tube to keep him from vomiting and an intravenous

needle in his arm. (App. 66-67; H.T.F. at 204-05.) Mrs. Graham stated that although petitioner was in a moderate amount of pain, he cooperated with everyone and was a "super" patient. (App. 66; H.T.F. at 203.) Although Dr. Martin Silverstein testified petitioner received Narcan,[20] a resuscitative drug, upon his arrival at the hospital (App. at 82-83; T.T., June 3, 1975 at 26-27), there was no evidence of what its effects were or how long they lasted. None of the drugs

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[20] This Court may take judicial notice of the definition and effects of Narcan as defined in the Physician's Desk Reference, Medical Economics Company, 1974 Edition. Federal Rules of Evidence, Rule 201(b), (d), (f). Thornton v. United States, 271 U.S. 414, 46 S.Ct. 585, 70 L.Ed. 1013 (Ga. 1926).

Narcan (naloxone hydrochloride) is an essentially pure narcotic antagonist. It does not produce respiratory depression, psychotomimetic effects or pupillary constriction. In the presence of physical dependence on narcotics, Narcan will produce withdrawal symptoms. (For further information see Appendix.)

were considered mind altering over a long period.[21]

Mrs. Graham confirmed Detective Hust's testimony that he had obtained permission from her and from doctors and other members of the hospital staff to speak with petitioner. (App. at 63; H.T.F. at 195.) She also said the decision whether to allow someone to see a patient is up to the individual nurse. (App. 65; H.T.F. at 202.) Mrs. Graham stayed with petitioner while Detective Hust asked him questions. (App. 63; H.T.F. at 195.) Although at one point she told petitioner on her own initiative that it might help to cooperate, she did not herself ask any questions. (App. 62; 65-66; H.T.F. at 194, 202-03.) She stated that petitioner

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[21] Dr. Silverstein was the treating physician on admission (T.T., June 3, 1975 at 22, 24, 25.)

> "Q. Were any of those drugs [given petitioner] what you consider mind altering drugs?
>
> "A. Over a long period, no."
>
> (T.T., June 3, 1975 at 51.)

appeared to be alert and to understand Detective Hust's questions. She also testified that no one physically or mentally abused petitioner or threatened him, or did anything else to force him to answer questions. (App. 63; H.T.F. at 196.)

Petitioner did not testify at the voluntariness hearing. At trial he testified on direct examination that just before the shooting he heard a crash from the living room, opened the bedroom door, and saw an individual running toward the bedroom with a gun in his hand. (T.T., June 5, 1975 at 162.) On cross-examination the prosecutor asked him if he recalled telling Detective Hust that he was not sure if the guy who came into the bedroom had a gun. (App. 86; T.T., June 6, 1975 at 235-36.) Petitioner stated he did not know. He also testified he had not been sure who Hust was talking about or what time he was

talking about. (App. 86-87; T.T. June 6, 1975 at 235-37.) The prosecutor then questioned petitioner as follows:

> "Do you recall being asked these specific questions by Detective Hust?
>
> "'Detective Hust: Go ahead.
>
> "'A. When I heard all the noise I ran out to check it out. Then I went back to the bedroom.
>
> "'Q. By Detective Hust - 'Where was Chuck?
>
> "'A. (By Mr. Mincey) Where was Chuck?
>
> "'Q' - by Detective Hust - 'yes.
>
> "'A (By Mr. Mincey) (Mincey shrugged his shoulders in a manner indicating he didn't know).
>
> "'Q - By Detective Hust - 'Did this guy that came into the bedroom have a gun?
>
> "'A. I can't say for sure. Maybe the guy had a gun."
>
> (App. 87; T.T., June 6, 1975 at 237-38.)

Petitioner again stated he did not know what

"guy" Detective Hust had been referring to. (App. 88; T.T., June 6, 1975 at 238.)

Petitioner further testified that at the time Officer Headricks was coming across the room at him it never entered his mind that he was being arrested. (App. 88-89; T.T. June 6, 1975 at 239-40, 252-53.)

> "Q Do you recall him asking you these questions, giving these answers:
>
> "'Q' From Detective Hust -- 'What do you mean, "all hell broke loose"?'
>
> "'Mincey: When he come back, a bust took place.
>
> "'Q A what took place? I can't read that word?
>
> "'A Bust. Bust.'"
>
> (App. 8, 9; T.T., June 6, 1975 at 253.)

Petitioner explained, "He had already told me that a policeman had been killed, so that's the only thing that could have happened." (App. at 90; T.T., June 6, 1975 at 254.)

In discussing his questioning by Detective Hust, petitioner testified he was trying to help as best he could (App. at 86; T.T., June 6, 1975 at 235, 302), and that he was trying to answer to the best of his recollection at the time. (App. at 86; T.T., June 6, 1975 at 235.)

At the conclusion of the voluntariness hearing, the trial court stated as follows:

> "As far as the voluntariness portion of it, it is my understanding that the State has no intention of using any statements made by the defendant, in their case in chief. The only thing that the Court has to determine in this matter is whether they should be used in the event Mr. Mincey takes the stand for impeachment purposes."
>
> (App. 68; H.T.F. at 208.)

At oral argument on petitioner's motion to suppress statements, counsel focused on Harris v. New York, 401 U.S. 222 (1971) and argued the voluntariness vel non of petitioner's written statements. (App. at 13-14; T.T., February 6, 1975 at 50-53.) The

trial court's ruling on the motion stated as follows:

> "IT IS ORDERED that Motion to Suppress statements is GRANTED as to same in the State's case in chief. IT IS ORDERED that Motion to Suppress statements for use for impeachment, if same is appropriate, is DENIED."
>
> (App. 74.)

Petitioner was charged in a five count indictment with first degree murder, assault with a deadly weapon, unlawful sale of narcotics, unlawful possession of narcotics for sale, and unlawful possession of a narcotic drug -- heroin. (App. 3-4.) He was found guilty of all the above-mentioned charges. The Arizona Supreme Court reversed the murder and assault with a deadly weapon convictions and affirmed the remaining three counts, State v. Mincey, supra.[22]

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[22] Respondent would point out that although petitioner was convicted in the trial court of all five counts, the Arizona

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Supreme Court affirmed only the narcotics convictions and reversed the murder and the assault with a deadly weapons conviction. As Mr. Justice Rehnquist stated in denying petitioner's motion to stay the retrial of the murder and assault counts, "[petitioner's] constitutional claims with respect to the admission of evidence at his trial can be reviewed here only insofar as they pertain to those convictions affirmed by the Supreme Court of Arizona and are therefore final judgments under 28 U.S.C.A. 1257 (as amended 1970)." ____ U.S. ____, 98 S. Ct. 23, 24 (1977). However, the Arizona Supreme Court did uphold the search of petitioner's apartment. This ruling would be binding on the trial court at retrial. In light of that, this Court could review all the convictions. Mills v. Alabama, 384 U.S. 214 (1966).

ARGUMENT I

THE "ARIZONA MURDER SCENE EXCEPTION" WHICH AUTHORIZES THE WARRANTLESS SEARCH OF A HOMICIDE SCENE OR LOCATION OF A SERIOUS PERSONAL INJURY WITH THE LIKELIHOOD OF DEATH AND SUSPECTED FOUL PLAY DOES NOT VIOLATE THE UNREASONABLE PROHIBITIONS OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Arizona's Murder Scene Rule is a Valid Exception to the Fourth Amendment.

The Arizona "Murder Scene Exception" is reasonable with a rational basis and therefore does not violate the Fourth and Fourteenth Amendments to the United States Constitution.

The individual states are not precluded from adopting their own rules regulating search and seizure so long as their standards are reasonable. Ker v. California, 374 U.S. 23, 34 (1963). The "Arizona Murder Scene Exception" is a reasonable exception to the general rule requiring the obtaining of a warrant prior to conducting a

search. See Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971) (generally a search warrant is a prerequisite to a search).

This Court has recognized that there are exceptions to the rule requiring a search warrant prior to a search. United States v. Edwards, 415 U.S. 800, 802.[23] A balancing test is used to determine whether a search may be had without a

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[23] The following are situations where this Court has found that a search warrant is not a prerequisite for a valid search; objects found in plain view, Coolidge v. New Hampshire, supra; consent has been given, Schneckloth v. Bustamonte, 412 U.S. 218 (1973); search incident to a lawful arrest, United States v. Robinson, 414 U.S. 218 (1973); hot pursuit -- emergency situation, Warden v. Hayden, 387 U.S. 294 (1967); exigent circumstances as in the case of movables such as vehicles, Chambers v. Maroney, 399 U.S. 42 (1970); stop and frisk situations, Terry v. Ohio, 392 U.S. 1 (1968); abandoned property, Abel v. United States, 362 U.S. 217 (1960); border searches, United States v. Martinez-Fuerte, 96 S.Ct. 3074 (1976).

warrant. The Court will weigh the "public interest" against the "Fourth Amendment interest of the individual" in determining whether the warrantless intrusion will be upheld. United States v. Martinez-Fuerte, 96 S.Ct. 3074, 3081 (1976). The test is one of reasonableness,[24] Terry v. Ohio, 392 U.S. 1, 20-21 (1967), decided on a case by case basis. Ker v. California, supra.

An examination of Arizona's "Murder Scene Rule" set in the background of the facts sub judice will demonstrate that the Arizona "Exception" is reasonable and the individual interest of petitioner Mincey under the Fourth Amendment must give way to the overriding need of the public. Here, Tucson police officers were in the midst of conducting a lawful arrest when one of

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[24] The Fourth Amendment does not specifically ban searches without warrant but only prohibits unreasonable searches and seizures. Carroll v. United States, 267 U.S. 132, 146-47 (1925).

their number was shot no less than five times (T.T., May 28, 1975 at 116) by petitioner. (T.T., June 5, 1975 at 163, 166-67; T.T., May 27, 1975 at 76.) Two other individuals were seriously wounded, see footnotes 11 and 12, supra. When the shooting occurred the officers were already lawfully inside petitioner's apartment to arrest him for narcotics violations.[25]

Common sense and good police practice dictated an immediate investigation surrounding the circumstances that left one dead and two others seriously injured. This would necessarily include a detailed search of the premises.[26]

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[25] Petitioner had offered to sell Headricks heroin. Headricks ran a field test to determine whether the substance was, in fact, heroin. The test was positive. See footnote 7 supra. Thus, the officers had probable cause to enter the apartment and arrest petitioner. Ker v. California, 374 U.S. 23 (1963); see United States v. Johnson, 561 F.2d 832 (1977), cert. denied 97 S.Ct. 2953.

[26] This Court has long recognized that

The public also had an undeniable interest in the prompt apprehension of the party or parties responsible for the acts of violence that occurred in apartment 211. People v. Superior Court of County of Ventura, 41 Cal.App.3rd 639, 641, 116 Cal.Rptr. 24, 27 (1974).[27]

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a common sense approach will be taken when overseeing search and seizure issues. Hill v. California, 401 U.S. 797, 804-05 (1971).

[27] This Court may take judicial notice of the rise in the rate of violent crimes committed in Tucson, Arizona, as compared to the estimated rate of violent crimes committed nationwide. The Apollon, 9 Wheat. 362, 374 (1824); Carroll v. United States, 267 U.S. 132, 159-66 (1924); see footnote 20 supra.

In 1973, the rate of violent crimes committed per 100,000 inhabitants was 417.8 in Tucson and an estimated 414.3 nationwide. Federal Bureau of Investigation, Crimes in the United States 1973 (Uniform Crime Reports) 93, 1 (1974). By 1974, the rate of violent crimes committed per 100,000 inhabitants had risen to 571.6 in Tucson and to an estimated 458.8 nationwide. Federal Bureau of Investigation, Crime in the United States 1974 (Uniform Crime Reports) 89, 11 (1975). In 1975, the last report available, the rate had increased to 594.9 in Tucson and to an estimated 481.5 nationwide. Federal Bureau of Investigation, Crime in

This Court has recognized the practical considerations "of effective criminal investigation", Ker v. California, supra, 374 U.S. at 32, and has inferred that under certain "exceptional circumstances" the need for effective law enforcement will dispense with the need for the magistrate's warrant. Johnson v. United States, 333 U.S. 10, 14-15 (1948). Such was the case when Reyna arrived at the scene, it was his duty to begin immediately to ascertain the cause of and party responsible for the shootings at the Colony Apartments. People v. Superior Court of County of Ventura, 41 C.A.3rd 636, 641, 116 Cal.Rptr. 24, 27 (1974). Without the "Arizona Exception", Reyna would have lost valuable time during the initial stages of

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the United States 1975 (Uniform Crime Reports) 82, 11 (1976). A comparison of these figures shows that from 1973 to 1975 the rate of violent crimes committed in Tucson per 100,000 inhabitants has increased 42.3 percent while the estimated increase nationwide was only 16.2 percent, see Respondent's Brief, Appendix.

his investigation.[28]

In other cases immediate action is needed for the preservation of life. See McDonald v. United States, supra, 335 U.S. at 454. See also Wayne v. United States, 318 F.2d 205, 209 (D.C. Cir. 1963) (Berger, J., concurring, dictum.)

It is important to note that the evil which gave rise to the enactment of the Fourth Amendment is not present herein should this Court approve the Arizona "Murder Scene Exception". See United States v. Rabinowitz, 339 U.S. 56, 83 (1950) (Frankfurter dissenting). The Fourth Amendment was the product of colonial dissatisfaction with an abhorrence of writs of assistance and general warrants. Chimel v. California, 395 U.S. 752, 761 (1969);

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[28] See also Mascolo, The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment, 22 Buffalo Law Review, 419, 428 (1973).

Boyd v. United States, 116 U.S. 616, 624-25 (1886). The case at bar does not involve the indiscriminate general searches but is limited solely to those isolated cases involving a death scene or the location of a serious personal injury with the likelihood of foul play. State v. Mincey, supra, 115 Ariz. at 482, 566 P.2d at 283. Thus, the exception at bar does not involve random searches conducted at the whim of an "officer in the field" like those struck down by this Court in Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

Further, once the entry has been made -- lawful entry is required under the Arizona Supreme Court's guidelines, State v. Mincey, supra, 115 Ariz. at 482, 566 P.2d at 283, the individual's privacy has already been invaded. Chimel v. California, supra, 395 U.S. at 776, 782 (White, J., dissenting). Thus, any further intrusion is minor and is far outweighed by the public's interest in

having the wrongdoer found and brought to justice with all due haste. As once a defendant has been arrested, his reasonable expectation has been diminished:

> "While the legal arrest of a person should not destroy the privacy of his premises, it does -- for at least a reasonable time and to a reasonable extent -- take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence."
>
> United States v. Edwards, 415 U.S. 800, 808-09 (1974).

Furthermore, under Rule 16, Arizona Rules of Criminal Procedure, 17 Ariz.Rev. Stat.Ann. (as amended 1975),[29] the Arizona defendant is given an opportunity prior to trial to promptly challenge[30]

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[29] See omnibus forms 20 and 16 in the Appendix. Form 16 was used in 1974, 17 Ariz.Rev.Stat.Ann. (1973) and form 20 is presently used. 17 Ariz.Rev.Stat.Ann. (1973).

[30] Under Rule 8.2, Arizona Rules of Criminal Procedure, 17 Ariz.Rev.Stat.Ann. (1975), a defendant in custody must be tried within 120 days of his initial

the admissibility of evidence obtained through a search and seizure.[31] Nor is

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appearance or 90 days from his arraignment whichever is the lesser. A defendant not in custody shall be tried within 120 days from his initial appearance or 90 days from his arraignment, whichever is greater. In 1974, defendants in custody had to be tried 90 days from the date of their initial appearance or 60 days from their arraignment, whichever was the lesser. The released defendant had to be tried within a 120 days of his initial appearance or 90 days from his arraignment, whichever was the lesser. Rule 8.2, 17 Ariz.Rev.Stat.Ann. (1973). Thus, the validity of the seizure of the evidence will be determined forthwith.

31 "In considering searches incident to arrest, it must be remembered that there will be immediate opportunity to challenge the probable cause for the search in an adversary proceeding. The suspect has been apprised of the search by his very presence at the scene, and having been arrested, he will soon be brought into contact with people who can explain his rights. As Mr. Justice Brennan noted in a dissenting opinion, joined by The Chief Justice and Justices Black and Douglas, in Abel v. United States, 362 U.S. 217, 249-250, 80 S.Ct. 683, 702, 4 L.Ed.2d 668 (1960), a search contemporaneous with a warrantless arrest is specially safeguarded since

the Arizona "Rule" susceptible to "hindsighting", United States v. Martinez-Fuerte, supra, 96 S.Ct. at 3068, because of the stringent guidelines set up by the Arizona Supreme Court restricting the application of the "Murder Scene Exception". In short, the Arizona "Rule" only applies: (1) to the scene of a homicide or location of a serious personal injury where there is a likelihood of foul play; (2) when the law enforcement officers were legally on the premises in the first

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'[s]uch an arrest may constitutionally be made only upon probable cause, the existence of which is subject to judicial examination, see Henry v. United States, 361 U.S. 98, 100, 80 S.Ct. 168, 169, 4 L.Ed.2d 134, and such an arrest demands the prompt bringing of the person arrested before a judicial officer, where the existence of probable cause is to be inquired into."

Chimel v. California, supra, 395 U.S. at 781 (White, J., dissenting.)

instance[32]; (3) when the search is limited to determining the circumstances of death; and (4) if the search began within a reasonable period following the time the officials learned of the murder or potential murder. State v. Mincey, supra, 115 Ariz. at 482, 556 P.2d at 283. In short, the Arizona exception is limited solely to a unique situation -- a murder scene.[33] When applying Arizona's "Rule" to the facts at hand, it is evident the circumstances at Apartment 211, Colony Apartments, fit within the "Murder Scene

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[32] Respondent would point out that the "lawfully present requirement" is similar to that of the "plain view" doctrine exception. Harris v. United States, 390 U.S. 234, 236 (1968).

[33] That the "Murder Scene Exception" is limited to a peculiar set of facts is substantiated by the lack of cases litigating the issue in Arizona. The following would appear to be the only Arizona cases, in addition to the case at bar, dealing with the "exception": State v. Sample, 107 Ariz. 407, 489 P.2d 44 (1971); State ex rel. Berger v. Superior Court, 110 Ariz. 281, 517 P.2d 1277 (1974); State v. Duke, 110 Ariz. 320, 518 P.2d 570 (1974). Sample v. Eyman, 469 F.2d 819 (9th Cir. 1972).

Exception". First, here one person was killed and two people were seriously injured during a gun battle at the apartment. Second, the METROofficers lawfully entered Apartment 211 to arrest petitioner for possessing and selling heroin. Third, the search was limited to ascertaining circumstances of the shooting. The drugs were material in establishing motive. Likewise, the search for the bullets and subsequent plotting and diagraming of the apartment were essential in reconstructing the event. Last, the search began immediately. The shooting occurred around 3:20 p.m. Reyna arrived around 3:28-3:30. He began his investigation immediately. See p. 14, supra.

With the above guidelines, it is easy for the trial court, or for that matter police officers in the field, to determine whether the "Arizona Murder Scene Exception" is applicable. Should the circumstance in issue not fit within the above framework,

neither "hindsighting", United States v. Martinez-Fuerte, supra, 96 S.Ct. at 3086, nor the location of hordes of contraband will save the search. See Sibron v. New York, 392 U.S. 40, 67 (1968) (fruits of search cannot justify original intrusion).

Even assuming the "Arizona Rule" is reasonable, the question arises why does Arizona need the "Murder Scene Exception"? First, respondent would ask this Court to take note of the rise in violent crime throughout the country. See footnote 27, supra. In order to combat this lawlessness, it is necessary for the interest of the individual to give way to the public interest of having fast and efficient criminal investigation tempered, of course, by the guidelines of State v. Mincey, supra. Without such an exception, the police will lose valuable time at the inception of the investigation. Immediacy is essential for resolutions of criminal conduct. Here, for example, Reyna

was at the scene when the blood was still wet. To hold otherwise will thwart prompt police investigation. The Arizona "Rule" is consistent with humanitarian motives as there may be other wounded and injured somewhere else in the premises other than at the initial point of entry. Therefore, officials should be allowed to search for them. See State v. Gosser, 50 N.J. 438, 236 A.2d 377 (1967). Such a rule is needed in order that individuals like petitioner may be brought to task for their deeds in the most expeditious manner possible so that the rest of society may live in an "ordered liberty".

The Arizona "Rule" is not a novel idea in constitutional law. This Court has implicitly recognized that a police officer may investigate without a warrant the sound of a shot or the cry for

help[34] and that the need for the detached magistrate may be dispensed with under exceptional circumstances. Johnson v. United States, supra, 333 U.S. at 14. See also Camara v. Municipal Court, 387 U.S. 523, 539 (1967) where this Court acknowledged that certain inspections without warrants would be proper in emergency situations. The issue then comes down to whether officers may conduct a warrantless search once they have lawfully entered the premises where a homicide has taken place or someone has been seriously injured with the likelihood of foul play.

Various states have upheld warrantless searches of the murder scene recognizing this type of search as being a reasonable exception to the general rule requiring

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[34] "This is not a case where the officers, passing by on the street hear a shot and a cry for help and demand entrance in the name of the law."

McDonald v. United States, 335 U.S. at 454, see United States v. Jeffers, 342 U.S. 48, 52 (1951).

warrants before a search can be conducted.

The California court, in People v. Wallace, 31 Cal.App.3rd 865, 107 Cal.Rptr. 659 (1973), in upholding the police technician's warrantless search of a kitchen drawer -- contents of drawer could not be seen without opening it -- 31 Cal.App.3rd 865, 868, 107 Cal.Rptr. 660 -- noted:

> "There is no more serious offense than unlawful homicide. The interest of society in securing a determination as to whether or not a human life has been taken, and if so by whom and by what method, is great indeed and may in appropriate circumstances rise above the interest of an individual in being protected from governmental intrusion upon his privacy. In our view this is such a case. We see here no more than the 'legitimate and restrained investigative conduct undertaken on the basis of ample factual justification' which is not proscribed by the Fourth Amendment. Terry v. State of Ohio, supra (1968) [392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889]. The public had a right to expect and demand that the police would conduct a prompt and diligent investigation of these premises to ascertain the

> cause of this apparently violent death and to solve any crime committed in the course thereof."
>
> Citing State v. Chapman, 250 A.2d at 210-211. People v. Wallace, 31 Cal.App.3rd at 869, 107 Cal.Rptr. at 661.

The Court went on to say that both common sense and good investigative procedures dictated that the police retain possession of the premises to ascertain the cause of the death. 31 Cal.App.3rd at 872, 107 Cal. Rptr. at 662. This same common sense approach recognizing that the interest of society justified the intrusion on the individual interest under the Fourth Amendment was followed by another California case in People v. Superior Court of County of Ventura, 41 Cal.App.3d 523, 116 Cal.Rtpr, 24 (1974).

The same rationale is present in other cases. In State v. Chapman, 1968-69 Me. 203, 250 A.2d 203 (1969), the

Supreme Court of Maine, in answering the defendant's contention that the failure of the police to obtain a search warrant while processing a murder scene,[35] held:

> "We are satisfied that if the police cannot, after lawful entry, make the sort of prompt, orderly and methodical investigation of the scene of a violent death that is here shown, the protection of the legitimate interests of society will be seriously weakened."
>
> 1968-69 Me. at 212, 250 A.2d at 212. (Emphasis added.)

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[35] See State v. Chapman, 1968-69 Me. at 205, 250 A.2d at 205 where the court framed the issues to be decided in Chapman's appeal.

> "The following issues are framed for decision here:
>
> '1. Whether or not the items taken by law enforcement officials were abondoned property at law and, therefore, not under the protection of the Fourth Amendment to the United States Constitution.
>
> 2. Whether or not the search and seizure was unreasonable under the Fourth Amendment to the United States Constitution on the particular facts of this case.

There, the officers, in response to a radio call, arrived at the defendant's home finding the victim dead and covered with blood. The defendant was placed in custody and taken from the scene even though no formal charges were filed. The investigation continued. Prior to the removal of the defendant, he gave permission for the officer to look around. However, the whiskey bottle -- the object sought to be suppressed -- was not found until several hours after the defendant left his home. The bottle was found in a trash can in the basement garage after more than a

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> "(a) Whether failure of law enforcement officials to obtain a search warrant while processing a murder scene is violative of the Fourth Amendment of the United States Constitution?
>
> "(b) Whether the law enforcement officials could have satisfied requirements of the specificity clause of the Fourth Amendment to the United States Constitution had they tried to obtain a search warrant?"

cursory examination of the premises.[36] The Court concluded that the officers had a duty and obligation to make a thorough investigation to "determine whether the decedent was the victim of foul play and if so by whom and by what means". State v. Chapman, supra, 1968-69 Me. at 210, 250 A.2d at 210. The Court went on to hold:

> ". . . if the police cannot after lawful entry, make the sort of prompt orderly and methodical investigation of the scene of a violent death that is shown, the protection of the legitimate interest of society will be seriously weakened."
>
> 1968-69 Me. at 212, 250 A.2d at 212.

This duty of the police to conduct a thorough investigation and search of the scene of a violent death without a search warrant was also recognized by the Court in State v. Brown, 475 S.W.2d 938, 949

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[36] The Court rejected the state's argument of abandonment, State v. Chapman, supra, 1968-69 Me. at 212, 250 A.2d at 212.

(Texas Ct.Cr.App. 1972). Again the search could not be classified as cursory. Here, on one occasion the officers had returned to the scene, finding the house locked, they crawled through a window and during the search of the home found a shirt belonging to the defendant with blood spots in a clothes hamper.

The same rationale -- police have the duty and authority to investigate death scenes -- is present in other cases even though the courts held that under the circumstances the admission of the evidence was harmless beyond a reasonable doubt. State v. Oakes, 129 Vt. 241, 276 A.2d 18, 24-25 (1971) and Lonquest v. State, 495 P.2d 575 (S.Ct. Wyoming 1972).

Other courts have approved the warrantless searches of death scenes, relying on the plain view doctrine. Stevens v. State, 443 P.2d 600 (S.Ct. Alaska 1968); State v. Gosser, 50 N.J. 438, 236 A.2d 377 (1967);

Patrick v. Delaware, 1967 Del. 268, 227 A.2d 486 (1967).

In Davis v. Maryland, 236 Md. 389, 397-98, 204 A.2d 76, 81-82 (1964), the Court upheld the search of the death scene on the plain view doctrine and search incident to arrest of the defendant.

In conclusion, the interest of society to see that those responsible for the taking of Officer Headricks' and the near taking of Charles Ferguson's and Debra Johnson's lives far outweighs the individual interest of petitioner Mincey under the Fourth Amendment.

B. Under the Totality of the Circumstances the Warrantless Search of Petitioner's Apartment was Reasonable.

Should this Court decide not to adopt the "Arizona Murder Scene Exception", the petitioner's conviction need not be reversed because the search of petitioner's apartment was reasonable under the circumstances. While

as a general rule, it is necessary to obtain a search warrant before making a search, Coolidge v. New Hampshire, supra, there are exceptions to this rule. One of these exceptions are searches made incident to a lawful arrest when the items seized are within the immediate control of the defendant. Chimel v. California, supra, 395 U.S. at 763.

Here petitioner had offered to sell Headricks heroin. Headricks had performed a Marquis field test to determine whether the substance was heroin. The test was positive. Therefore, Headricks had probable cause to arrest petitioner, see footnote 7 supra.

Petitioner was arrested in the bedroom. The shirt with petitioner's identification containing the papers of heroin and toilet tube with heroin was found in the bedroom on a chair, see footnote 16 supra. Certainly, the shirt containing the heroin was within

petitioner's "immediate control" and therefore subject to being seized pursuant to the lawful arrest of petitioner. See Hill v. California, 401 U.S. 797 (1971).

This leaves the heroin and other paraphernalia found in the bathroom, see footnote 16, supra. The heroin was sitting in a jar on a plate. (T.T., May 29, 1975 at 130.) One of the reasons for allowing a search incident to a lawful arrest is to prevent the destruction of evidence. Chimel v. California, supra, 395 U.S. at 763. Headricks had told the other officers via the monitor that the heroin was in the bathroom. (H.T.J. 162.) It goes without saying that heroin can be easily disposed of by flushing it down the commode.

When Fuller entered the apartment, Ferguson was in the hall between the bathroom and bedroom. (T.T., May 28, 1975 at 6.) It was, therefore, only reasonable to check the bathroom under the assumption that

Ferguson was going in the bathroom to destroy the evidence -- the heroin. This was not the routine search condemned in Chimel v. California, supra, 395 U.S. at 763, but one to prevent the destruction of evidence. Thus, all the heroin and drug paraphernalia was seized incident to petitioner's arrest and therefore properly admitted at his trial.

The investigation and search of petitioner's apartment after the shooting was reasonable; and as a result, the trial court properly denied petitioner's motion to suppress.[37] After the officers lawfully entered petitioner's apartment, one of their number was shot at least five times. (T.T., May 28, 1975 at 116.) He died a short time later.[38]

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[37]Only unreasonable searches are prohibited by the Fourth and Fourteenth Amendments, Carroll v. United States, supra.

[38]See footnote 13, supra.

Common sense and good police practice dictated but one course of conduct -- begin an immediate investigation to determine who was responsible and the circumstances surrounding the shootings. People v. Wallace, supra. In short, the exigencies of the circumstances required an immediate and thorough investigation of the shootings that left one dead and two seriously injured. Patrick v. State, supra, 1967 Del. 486, 227 A.2d at 486.

The logic of Reyna's actions becomes evident after examining the scene that greeted Reyna at Apartment 211 upon his arrival. There was blood in the hallway. The bedroom and hall walls had bullet holes. The living room window was shattered. Shell casings and a live bullet were in the bedroom. There were blood stains on a chair, desk and rug. Some of the blood was still wet.

(T.T., May 29, 1975 at 79).[39] Besides petitioner, there were two other people in the apartment suffering from bullet wounds. Headricks died around 4:00 p.m., see footnote 13 supra. Reyna did what any reasonable person would do under the same circumstances -- find out what happened and who was the responsible party.

It might be argued that Reyna should have obtained a search warrant when he returned the next day. However, so long as the initial search was justified, the fact that it continued past the first day should not vitiate the search conducted the following days. See also, United States v. Edwards, supra, 415 U.S. at 805, where this Court held that the search of defendant's clothes ten hours after his arrest was not invalid because of the wait since the officer could have made the search

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[39] Of course, items in the open would seem to be admissible under the plain view doctrine, Coolidge v. New Hampshire, supra.

initially. The test in Edwards was not whether it was reasonable to get a search warrant but whether the search itself was reasonable. 415 U.S. at 807. Thus, Reyna's search the following days should not be invalidated because the search was reasonable at its inception. Also, it would seem unreasonable to invalidate the search simply because Reyna could not finish his investigation -- search at one time.[40]

Finally, respondent submits that petitioner, by firing at least five shots into Headricks, could not expect his acts to go unnoticed. He certainly could and should have expected the authorities to investigate

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[40] The information obtained from petitioner's apartment after the county attorney rented the apartment on April 3, 1975, (see footnote 15, supra) was validly obtained because petitioner had given his landlord notice he was leaving as of October 31, 1974. (T.T., May 28, 1975 at 172-73.) Therefore, he had abandoned the apartment at the time the county attorney rented it and therefore the information was validly obtained. See Abel v. United States, 362 U.S. 217 (1960).

his actions even if they were justified. In other words, when petitioner emptied his pistol "at Headricks", he forfeited any reasonable expectation of privacy he might have had until the authorities ascertained the circumstances of the shooting. Or, in other words, shootings in crowded apartments do not go unheeded.

In conclusion, Reyna did only what common sense dictated. Under the circumstances, his search was reasonable. It was consistent with good police practice and was carried out for the needs of the populace which mandate that parties responsible for acts like those that occurred on October 28, 1974, be brought to the bar of justice at the earliest possible time.

ARGUMENT II

THE STATE PROSECUTOR PROPERLY CROSS-EXAMINED PETITIONER CONCERNING TWO PRIOR INCONSISTENT STATEMENTS HE HAD MADE TO A POLICE OFFICER DURING HIS RECOVERY IN THE HOSPITAL.

As indicated in the Statement of the Case, the prosecutor cross-examined petitioner at trial concerning two prior statements he had written for Detective Hust in the hospital. (App. at 84-90; T.T., June 6, 1975 at 231-39, 252-56.) Petitioner now contends this impeachment did not accord with Harris v. New York, 401 U.S. 222 (1971) and Oregon v. Hass, 420 U.S. 714 (1975) because his prior statements (1) were not inconsistent with his testimony bearing directly on the crime charged and (2) were involuntary and untrustworthy. He therefore concludes the state's use of his prior statements violated his rights under the Fifth, Sixth and Fourteenth Amendments to the United

States Constitution, and asks the Court to reverse the judgment of the Supreme Court of Arizona.

As set forth above, the state contends petitioner's prior statements were voluntary and trustworthy under traditional due process standards. The state further contends both statements about which petitioner was cross-examined were sufficiently inconsistent with his direct testimony at trial to warrant their use as an aid to the jury. The state's position is, therefore, that the use of such statements for impeachment was proper under Harris v. New York, supra, and Oregon v. Hass, supra.

Inconsistency of Petitioner's Prior Statements with his Testimony at Trial.

In Harris v. New York, 401 U.S. 222 (1971), the Court held the prosecutor properly impeached the petitioner's testimony with prior statements that "partially

contradicted" it, 401 U.S. 222, 223, even though the statements were concededly violative of Miranda v. Arizona, 384 U.S. 436 (1966). The Court stated:

> "The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."
>
> (401 U.S. 222, 226.)

The Court's opinion noted that the prosecution "did no more than utilize the traditional truth-testing devices of the adversary process". The Court also stated:

> "The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility . . . ."
>
> (401 U.S. 222, 225.)

The Court reaffirmed the holding of Harris v. New York, supra, in Oregon v. Hass, 401 U.S. 714 (1975), stating:

> "Here, too, the shield provided by Miranda is not to

> be perverted to a license to testify inconsistently, even perjuriously, free from the risk of confrontation with prior inconsistent utterances."
>
> (420 U.S. 714, 722.)

It would seem that Harris' reference to "traditional truth-testing devices of the adversary process" means the Court's rationale contemplated no greater degree of inconsistency than that required by the common law device of impeachment by prior inconsistent statements.[41] Of such

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[41] See, United States ex rel. Wright v. Lavallee, 471 F.2d 123 (2nd Cir. 1972), cert. denied 414 U.S. 867 (1973). In that case petitioner contended he had made certain statements after his request for a lawyer was denied. The Court of Appeals found it was not necessary to determine whether this was so from the state court record because the statements were used only to impeach petitioner's testimony under Harris v. New York, 401 U.S. 222 (1971). The Court rejected petitioner's protestation that the statements did not "directly contradict" his testimony, stating:

> "The conflict in crucial details between petitioner's trial version of the shooting and that given in his earlier statement was so extensive that the

impeachment, 3A Wigmore on Evidence (Chadbourne Ed. 1970) § 1040 says:

> "As a general principle, it is to be understood that the inconsistency is to be determined, not by individual words or phrases alone, but by the whole impression or effect of what has been said or done. On a comparison of the two utterances, are they in effect inconsistent? Do the two expressions appear to have been produced by inconsistent beliefs?"[42]
>
> (At 1048.) (Emphasis in original.)

> earlier inconsistent description 'undoubtedly provided valuable aid to the jury in assessing petitioner's credibility.' 401 U.S. at 225, 91 S.Ct. at 645."
>
> (471 F.2d 123, 127.)

But cf. United States v. Trejo, 501 F.2d 138 (9th Cir. 1974) apparently requiring a degree of inconsistency that would indicate an affirmative use of perjury by the witness.

[42] As an example, 3A Wigmore § 1040 gives the following:

> "C. Allen, J. in Foster v. Worthing, 146 Mass. 607, 608 16 N.E. 572, 574 (1888): It

Thus, a prior statement of a witness is admissible under traditional principles if

> is not necessary, in order to make the letter competent, that there should be a contradiction in plain terms. It is enough if the letter, taken as a whole, either by what it says or by what it omits to say, affords some presumption that the fact was different from his testimony; and in determining this question, much must be left to the discretion of the presiding judge."
>
> (At 1049.)

McCormick on Evidence (West 1972) § 34:

> "[W]hat degree of inconsistency between the testimony of the witness and his previous statement is required? The language of some cases seems overstrict in suggesting that a contradiction must be found, and under the more widely accepted view any material variance between the testimony and the previous statement will suffice. . . . Seemingly the test should be could the jury reasonably find that a witness who believed the truth of the facts testified to would have been unlikely to make a prior statement of this tenor? Thus, if the previous statement is ambiguous and according to one meaning would be inconsistent with the testimony, it

its overall effect is to undermine the witness' sincerity by suggesting that at an earlier time he held a different belief from that which now apparently actuates his testimony. See Commonwealth v. Pickles, 364 Mass. 395, 305 N.E.2d 107 (1973);[43] McCormick on Evidence (West 1972) § 34, supra, at note 3.

In the instant case, petitioner testified he was quite sure he had seen a gun in Officer Headricks' hand as Headricks entered the bedroom. (App. at 84; T.T., June 5, 1975 at 162-74.) On cross-examination the prosecutor brought out that

> should be admitted for the jury's consideration."
>
> (At 68.)

[43] In Pickles the Court stated:

> "[A] 'prior inconsistent statement' need not directly contradict the testimony of the witness. It is enough if its implications tend in a different direction."
>
> (364 Mass. 395, 402, 305 N.E.2d 107, 111.)

when Detective Hust asked him at the hospital whether "this guy" that came into the bedroom had a gun, petitioner had written, "I can't say for sure. Maybe the guy had a gun." (App. at 87; T.T., June 6, 1975 at 237-38.) Immediately thereafter, petitioner testified:

> "A. Well, I can't say for sure who he was talking about because he was asking about Chuck. So there's no telling who he was talking about.
>
> "Q. But he was talking about where Chuck was at the moment those officers entered the apartment, was he not?
>
> "A. Yes."
>
> (App. at 88; T.T., June 6, 1975 at 238.)

Petitioner's testimony and his prior statement were prima facie inconsistent, if not flatly contradictory, regardless of his attempted explanation.[44] (App. at 88-92;

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[44] 3A Wigmore on Evidence (Chadbourne Ed. 1970) § 1044 states:

> "[T]he impeached witness may always endeavor to explain

T.T., June 6, 1975 at 238-39, 252-56, 290-94.) It was therefore properly admitted to impeach his testimony under well-known evidentiary principles. 3A Wigmore on Evidence (Chadbourne Ed. 1970) § 1040, McCormick on Evidence § 34, and Commonwealth v. Pickles, supra.

> away the effect of the supposed inconsistency by relating whatever circumstances would naturally remove it. The contradictory statement indicates on its face that the witness has been of two minds on the subject, and therefore that there has been some defect of intelligence, honesty, or impartiality on his part; and it is conceivable that the inconsistency of the statements may turn out to be superficial only, or that the error may have been based not on dishonesty or poor memory but upon a temporary misunderstanding. To this end it is both logical and just that the explanatory circumstances, if any, should be received. . . ."
>
> (At 1062.)

Petitioner also testified that when the officers entered his apartment, he did not know Officer Headricks was a police officer and it never entered his mind that an arrest was taking place. (App. at 88-89; T.T. June 6, 1975 at 252-53; T.T. June 5, 1975 at 163, 204.) The prosecutor brought out, however, that when Detective Hust questioned him at the hospital shortly after the shooting, he described the melee as a "bust". (App. at 89; T.T., June 6, 1975 at 255.) Although arguably subject to mitigating explanation, the prior statement was prima facie inconsistent with petitioner's testimony because his spontaneous characterization of the armed intrusion as a "bust" could easily have sprung from a recollection of his contemporaneous perceptions of the shooting incident. Petitioner's testimony and his prior statement appeared to have been "produced by inconsistent beliefs" about the

character of the occurrence, 3A Wigmore on Evidence (Chadbourne Ed. 1970) § 1040, supra, and the prosecutor properly cross-examined him about the prior statement.[45]

Petitioner apparently cites this Court's decision in The Charles Morgan, 115 U.S. 69 (1884) for the proposition that the prosecutor improperly failed to give him an advance opportunity to clarify his statements before cross-examining him about them. To the extent he is arguing that giving the witness an opportunity to explain a prior statement is a precondition to cross-examining him about it, he is completely wrong. The Charles Morgan, supra, merely held in accordance with the familiar rule that the impeaching party must call the witness' attention to his prior inconsistent statement and allow

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[45] See, e.g., United States v. Barrett, 539 F.2d 244, 253-54 (1st Cir. 1976); United States v. Feldman, 136 F.2d 394, 399 (2nd Cir. 1943), aff'd. 322 U.S. 487 (1944).

him an opportunity to explain it before the party may prove the prior inconsistent statement by extrinsic evidence.[46] In this case no extrinsic evidence was offered to prove petitioner's prior inconsistent statements: he was only cross-examined about them. Moreover, both during the cross-examination and on redirect, petitioner had ample opportunity to explain them away. (App. at 88, 90, 92; T.T., June 6, 1975 at 252, 256, 293-94.)

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[46] The Charles Morgan, 115 U.S. 69, 78. Accord, Conrad v. Griffey, 16 How. 38, 46-47 (1853); United States v. Wright, 489 F.2d 1181, 1187 (D.C. Cir. 1973); United States v. Atkins, 487 F.2d 257, 259, n. 1 (8th Cir. 1973); Burton v. United States, 175 F.2d 960, 965 (5th Cir. 1949), cert. denied, 338 U.S. 909 (1950); 3A Wigmore on Evidence (Chadbourne Ed. 1970) §§ 1025-29. See Rule 613(b), Federal Rules of Evidence.

Petitioner's prior statements were sufficiently inconsistent with his testimony at trial to warrant their use under Harris v. New York, supra, and Oregon v. Hass, supra. In addition, the prosecutor followed the proper procedure for cross-examination on a prior inconsistent statement.

Voluntariness and Trustworthiness of Petitioner's Prior Statements.

Harris v. New York, 401 U.S. 222 (1971) held that statements of an accused taken in violation of Miranda v. Arizona, 384 U.S. 436 (1966), may nonetheless be used to impeach his testimony at trial "provided of course that the trustworthiness of the evidence satisfies legal standards". 401 U.S. 222, 224. In reaffirming and applying Harris, the Court stated in Oregon v. Hass, 420 U.S. 714 (1975):

> "There is no evidence or suggestion that Hass' statements to Officer Osterholme on the way to Moyina Heights were involuntary or coerced.

> He properly sensed, to be sure, that he was in 'trouble'; but the pressure on him was no greater than that on any person in like custody or under inquiry by any investigating officer."
>
> (420 U.S. 714, 722-23. (Emphasis added.)

Under Harris and Oregon, therefore, statements taken in violation of Miranda, supra, may be used to impeach the testimony of the accused if they are determined to have been voluntary and trustworthy.[47]

---

[47] Petitioner asserts in passing (Petitioner's Brief at 25) that the trial court ran afoul of Jackson v. Denno, 378 U.S. 368 (1964) by failing to make a finding that his statements were voluntary. It is true that no express finding was made. (App. 74.) Under Sims v. Georgia, 385 U.S. 538 (1967), after remand, 389 U.S. 404 (1967), however, a "formal finding" is not necessary for compliance with Jackson. All that is required is that the trial court's conclusion that the statement is voluntary "appear from the record with unmistakable clarity". 385 U.S. 538, 544. In this case the trial court's conclusion concerning voluntariness is unmistakably clear from the record. At the voluntariness hearing, the prosecutor disavowed any intention to use any of petitioner's statements in his case-in-chief, and the trial judge stated the only thing she had to determine was whether they could be used to impeach petitioner's testimony.

Petitioner now contends the circumstances under which his statements were made failed to comply with those standards. His contention is unsupported by close scrutiny of the record and must fail.

The determination of whether petitioner's statement was voluntary, will be made after an examination of the "totality of the circumstances". See Procunier v. Atchley, 400 U.S. 446, 453 (1970) (the voluntariness

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(App. 68.) In that context the trial judge specifically referred to "voluntariness" as the "only question" before her. (H.T.F. at 208.) At oral arguments on petitioner's Motion to Suppress statements, counsel focused on Harris v. New York, supra, and argued the voluntariness question almost exclusively. (T.T., February 6, 1975 at 50-53.) The trial court's minute entry ordered the statements suppressed for use in the state's case-in-chief, but denied the motion as to use "for impeachment if appropriate". (App. 74.) From this context it is unmistakable that the trial court concluded the statements were voluntary. The Supreme Court of Arizona analyzed the Jackson issue in a similar fashion (App. 106-07) and petitioner has not to this point offered any refutation.

of a defendant's statements in pre-Miranda situation was "resolved in light of the totality of the circumstances"). In resolving issues of voluntariness, this Court can make its own examination of the record, Brooks v. Florida, 389 U.S. 413, 415 (1967), and independent determination, if warranted. Davis v. North Carolina, 384 U.S. 737, 742 (1966). Such a determination overruling the conclusion of the trial court is not warranted in the case at bar.

Petitioner's argument that Detective Hust overbore his will rests on a selective emphasis of factual circumstances that paint a lurid picture of coercion and insensitivity. It is particularly appropriate for the Court to engage in a close analysis of the record in this case; for petitioner's lurid picture fades to nothing when exposed to the light of day.

Petitioner asserts his fatigue made

him more susceptible to overbearing of his will, and cites Leyra v. Denno, 347 U.S. 556 (1954) and Ashcraft v. Tennessee, 322 U.S. 143 (1944), after remand, 327 U.S. 274 (1946). Leyra and Ashcraft, however, fail to support his contention. The petitioner in Leyra was questioned continuously by police for several days and nights. When he was at the point of physical and emotional exhaustion, he was closeted with a police psychiatrist who wheedled a confession out of him through psychiatric techniques and feigned sympathy and support. The petitioner in Ashcraft was subjected to the third degree continuously for thirty-six hours by teams of police and prosecutors operating in relays. In contrast, petitioner was questioned intermittently for approximately three hours at most. (App. 59-60; H.T.F. at 186-87; Defendant's Exhibit D; State's Exhibit 2.) He was awake at all times and appeared

alert to his attending nurse. (App. 63, 66; H.T.F. at 196, 204.) Detective Hust periodically ceased questioning him and told him to rest when he appeared to tire. (App. 59; H.T.F. at 186.) There was no evidence that he was comatose at the time of the questioning; indeed, the evidence clearly shows he was not. Moreover, there was no evidence of how long he had been without sleep, and hence the fact that he did not sleep during the evening of October 28, 1974, is of little significance.

Petitioner also asserts his will to resist was lowered by the fact that he was receiving sustenance intravenously. Davis v. North Carolina, 384 U.S. 737 (1966), cited by petitioner, is clearly inapposite. The petitioner there was arrested and held incommunicado for sixteen days until he confessed to rape and murder. During this time he was fed two thin, dry sandwiches

twice a day plus peanuts and cigarettes, and lost fifteen pounds. In the instant case there was no evidence of when Mr. Mincey last ate, and no evidence that he was affected in any way by lack of nourishment. The affects of his intravenous feeding can only be speculated upon, and cannot form the basis for a determination of voluntariness.

The only evidence that petitioner was in unbearable pain was his own self-serving statements in Exhibits Defendant's D and State's 2 and at trial. (App. at 91; T.T., June 6, 1975 at 291.) His nurse, Elizabeth Graham, who presumably had experience in gauging from objective appearances the degree of pain her patients were suffering, testified he was only in a moderate amount of pain. (App. at 66; H.T.F. at 203.) Moreover, the cases cited by petitioner go far beyond the facts of this case and do not support his position. In Reck v. Pate, 367 U.S. 433 (1961), the

mentally retarded petitioner was held incommunicado for four days, during which time he was ill and in pain and was questioned daily by groups of police officers for up to seven hours. The appellant in Ziang Sung Wan v. United States, 266 U.S. 1 (1924), was harassed and interrogated constantly for twelve days. He suffered from spastic colitis, which a doctor testified would cause constant pain and would have induced him to confess to end the torture. And in Beecher v. Alabama, 389 U.S. 35 (1967), after remand, 408 U.S. 234 (1972), the petitioner was captured after being shot in the leg. He was taken to a prison hospital, where his leg became so painful he required morphine every four hours. A medical assistant told him to cooperate with the police, and told the police to let him know if he did not tell them what they wanted to know. He signed written confessions after ninety minutes of interrogation.

Petitioner's situation was plainly not comparable to those in Reck, Ziang Sung Wan and Beecher, supra.

Petitioner also places great emphasis on the needles and tubes to which he was connected at the time of questioning. Although these post-operative accoutrements present an unpleasant picture, a picture is all it is, for there is no evidence whatsoever concerning the effect they may or may not have had on petitioner's decision to communicate with Detective Hust. In addition, Mrs. Graham testified that petitioner was awake and breathing normally, and that the oxygen he was receiving was a precautionary measure. (App. at 64-66; H.T.F. at 198-204.)

Petitioner also asserts the verbal abuse he received from a police officer shortly after the shooting lent an atmosphere of intimidation to the events that followed. Beecher v. Alabama, supra, and Clewis v. Texas, 386 U.S. 707 (1967), cited by petitioner

fall short of supporting his claim. In Beecher the petitioner was downed in a chase by police with a bullet in his leg. While he was down, the police held guns to his head and demanded that he confess to rape and murder. When he denied he had done so, one police officer said he was going to kill him and fired a rifle next to his ear. Petitioner then confessed. After being threatened by a mob in jail, petitioner later signed written confessions while in excruciating pain at a prison hospital. In contrast, the alleged abuse herein was "move nigger move" (App. at 47; H.T.F. at 163) and must have occurred for all practical purposes during or at the end of the "heat of battle". (App. at 92; T.T., May 28, 1975 at 7-9.) This can hardly be considered as a contributing factor to petitioner's statement, particularly after considering the lapse of time -- three to four hours minimum (App. at 43-44; H.T.F. at 156-57) --

between petitioner's arrest at the apartment and the interview in question. During this period, petitioner received emergency room treatment for his injury. (T.T., June 3, 1975 at 24-27.) This necessarily broke any coercive atmosphere of the "battle scene". In addition, a reading of State's Exhibit 2 (Respondent's Brief Appendix, pp. 2-7) of the interview -- demonstrates a willingness on the part of the petitioner to continue with the interview:

"HUST: Do you remember shooting anyone or firing a gun?

"MINCEY: This is all I can say without a lawyer.

"HUST: If you want a lawyer now, I cannot talk to you any longer, however, you don't have to answer any questions you don't want to. Do you still want to talk to me?

"MINCEY: (Shook his head in an affirmative manner.)

* * * *

"HUST: Did you give him a sample?

"MINCEY: What do you call a sample?

"HUST: A small amount of drug or narcotic to test?

"MINCEY: I can't say without a lawyer.

"HUST: Did anyone say police or narcs when they came into the apartment?

"MINCEY: Let me get myself together first. You see, I'm not for sure everything happened so fast. I can't answer at this time because I don't think so, but I can't say for sure. Some questions aren't clear to me at the present time.

"HUST: Did you shoot anyone?

"MINCEY: I can't say, I have to see a lawyer.

"HUST: Okay, I explained before about an attorney and that you don't have to talk if you don't want to. You can also refuse to answer any individual questions. Are you still willing to talk to me without an attorney present?

"MINCEY: (head shake yes)"

(Respondent's Brief Appendix at 3 and Appellant's Brief 3a and 5a.)

It is true that petitioner indicated later on in the interview that he wanted a lawyer. (State's Exhibit 2, Respondent's Brief Appendix at 7.) However, the whole tenor of the interview is one of willingness on the part of petitioner to talk with Hust. At one point, petitioner suggested they "rap tomorrow". (State's Exhibit 2, Respondent's Brief Appendix at 6.) In fact, at the end of the interview the petitioner asked if Hust was coming back. This is hardly characteristic of an atmosphere of coercion.

Understandably, then, there is no evidence in the record to support petitioner's claim, other than the commands at his arrest, that his statement was the product of coercion. The case at bar can

be contrasted to Clewis v. Texas, supra, where the petitioner was held for thirty-eight hours and interrogated intermittently. During this time he was sick, had little sleep or food, and had no contact with anyone other than police. He was also forced to take polygraph tests and was taken to the grave of his deceased wife. He later repudiated all three of his confessions, the first of which admitted commission of the murder by a means inconsistent with the facts.

Petitioner relies heavily on the fact that Mrs. Graham, "the one person he should have been able to turn to", "encouraged him to respond to Detective Hust's questioning". (Petitioner's Brief at 22.) In point of fact, Mrs. Graham at one point merely told petitioner that "it might help" if he cooperated. (App. at 66; H.T.F. at 203.) In addition, respondent would point out that Nurse Graham witnessed the statement and

concluded that petitioner's statement was voluntary. See Exhibit "D", pp. 3a and 3b, Respondent's Brief Appendix. There is no indication of repeated importuning or overreaching, as petitioner seems to imply. Further, a suggestion that "it might help" to cooperate with Detective Hust surely does not amount to coercion, or anything approaching it. This is especially so in view of the fact that Mrs. Graham did not participate in any of the questioning. (App. at 61-67; H.T.F. at 193-206.) Finally, it appears from Mrs. Graham's testimony that petitioner was extremely cooperative and independent of her suggestion to him. (App. 66; H.T.F. at 203; State's Exhibit 2.)

Petitioner cites Sims v. Georgia, 389 U.S. 404 (1967); Haynes v. Washington, 373 U.S. 503 (1963); Fikes v. Alabama, 352 U.S. 191 (1957); and Haley v. Ohio, 332 U.S. 596 (1948) for the proposition that isolation

from one's friends and counsel is an important factor in determining voluntariness vel non. This principle is certainly correct, but has no application here. In all the cases cited by petitioner, the accused persons were cut off from the outside world as a conscious ploy by police to obtain incriminating statements. For example, in Haynes the petitioner was held for sixteen hours before he confessed. During that time the police refused his requests to call his wife and an attorney. In fact, he was told he would not be allowed to call anyone until he cooperated and gave a written confession. Similarly, in Fikes the petitioner was arrested for "investigation" and purposely isolated from his family and counsel. In contrast, in this case petitioner was "isolated" not as a result of police design, but because he was being treated for gunshot wounds in a hospital. There was no evidence that his friends or

family were refused permission to see him. Moreover, Detective Hust in fact answered his questions about Debbie Johnson, and assured petitioner he would let someone at the air base know where he was and have them contact someone for him. (State's Exhibit 2, Respondent's Brief Appendix at 5.) This is clearly not a case of incommunicado detention as petitioner seems to imply.

Petitioner also argues the voluntariness of his statements was affected by his lack of experience with the police. The record contains no evidence that he lacked experience with the police. The record likewise fails to support an inference that petitioner was drugged at the time he was questioned. Although Dr. Martin Silverstein testified he had received resuscitative drugs at the time of his admission to the hospital (App. 82-83; T.T., June 3, 1975 at 26-27), there is no evidence of what the effects of those drugs were and whether they

continued to affect him at the time of questioning. There is also no evidence that petitioner received any drugs in intensive care, or that he was under the influence of any mind-affecting drug at that time. (See App. 61-67; H.T.F. at 193-206.) The situation in Townsend v. Sain, 372 U.S. 293 (1963), stands in marked contrast. There the record contained allegations that the petitioner was a heroin addict and that he was injected with phenobarbital and hyoscine, which acts as a "truth serum", shortly before he confessed. There was also evidence that he was unusually susceptible to these drugs because of his addiction. This Court held that if proved, these allegations would establish his confession as involuntary. There is no similar evidence in this case whatsoever.

Despite petitioner's assertions, the record reasonably supports only one

conclusion -- that his statements to Detective Hust were wholly voluntary. Petitioner's replies throughout the interview were responsive and lucid and indicated attentive comprehension of all that Detective Hust said. He was cooperative throughout the interview, stating that "[w]e'll get it together" and "[t]his information was given so that it might bring this case to an end". (Respondent's Brief Appendix at 2, Defendant's Exhibit D.) Moreover, at the beginning of the interview Detective Hust advised him of his constitutional rights, reminding him of his right to counsel when petitioner requested a lawyer and offering to terminate the interview if petitioner so desired. (App. 50; State's Exhibit 2; H.T.F. at 169.) By affirmative nods of his head, however, petitioner indicated he still wished to talk to Detective Hust. (State's Exhibit 2, Respondent's Brief Appendix at 3 and Defendant's Exhibit D, Respondent's Brief Appendix at 3a and 5a.)

Petitioner's greatest overall emphasis is on the supposed denial of his right to counsel, and on his own physical condition and how it might have affected the voluntariness of his statements. As this Court recognized in a similar context in Procunier v. Atchley, 400 U.S. 446 (1971), however,

> "Low intelligence, denial of the right to counsel, and failure to advise of the right to remain silent were not in themselves coercive. Rather they were relevant only in establishing a setting in which actual coercion might have been exerted to overcome the will of the suspect."
>
> (400 U.S. 446, 543-54.)

Even assuming a setting under which petitioner was more susceptible to coercion, it is plain from the record that no coercion in any form occurred within the meaning of Procunier, supra. Petitioner does not contend Detective Hust physically or verbally abused him, and it is clear from the flow of

the interview that this did not occur. (State's Exhibit 2.) Further, petitioner's physical needs were attended to, and medical aid was not conditional on his answering questions. Both Detective Hust and Mrs. Graham testified that no promises, threats or physical or mental coercion were used at any time. (App. at 58-59, 63; H.T.F. at 184-85, 196.) This was not contradicted by petitioner. Moreover, Detective Hust respected petitioner's physical condition and allowed him to rest when he appeared tired. (App. at 59-60; H.T.F. at 186-87.) Finally, petitioner was consistently cooperative during his stay in the intensive care unit. (App. at 66; H.T.F. at 203.) The totality of the circumstances belie the view that his statements were involuntary and instead substantiates the trial court's conclusion that they were, in fact, voluntary.

CONCLUSION

The "Arizona Murder Scene Exception" is a reasonable exception to the general rule requiring search warrants before the conducting of a search. Here the public need for the "Arizona Exception" far outweighs the Fourth Amendment interest of the individual. Even should this Court be unwilling to adopt the "Arizona Murder Scene Exception", the search of petitioner's apartment was reasonable under the "totality of the circumstances".

The trial court correctly allowed the prosecutor to cross-examine petitioner concerning two of his prior statements because they were inconsistent with his testimony at trial. The prior statements were voluntarily made.

Because of this, the judgments and sentences affirmed by the Arizona Supreme

Court in this case should be affirmed by this Court, see footnote 22, supra.

Respectfully submitted,

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Attorneys for RESPONDENT

January 1978

SUPPLEMENTARY REPORT

[illegible] HOMICIDE/[illegible], [illegible]	OCTOBER 28, 1974		[illegible]
[illegible]	1150 E. [illegible]		[illegible]
[illegible], [illegible]	[illegible] S. [illegible]		[illegible]
RUFUS JUNIOR [illegible]	1150 E. [illegible] ST.	[illegible] POSS OF [illegible] FOR SALE	

CASE STATUS:

SUSPENDED

DETAILS OF SUPPLEMENTAL INFORMATION

On OCTOBER 28TH, 1974, received a phone call at the station along with DETECTIVE [illegible] arriving and advising us that there was a shooting involved in a narcotic transaction at 1150 E. [illegible] and we were to report there as per request of CAPTAIN [illegible]. That time I arrived at the apartment upon briefly checking it out SGT. [illegible] arrived and assigned me to go to ARIZONA MEDICAL CENTER to handle the investigation at that location.

Upon my arrival at ARIZONA MEDICAL CENTER, was met by MR. [illegible], who advised me to use his office which was being set up as a command post. DETECTIVE CHARLIE [illegible] was already in the office and making some phone calls. DETECTIVE [illegible] advised me that [illegible] was in the emergency room being worked on at the present time. A short time later, we were informed that the three suspects were arriving out front. That time I asked DETECTIVE [illegible] to make a phone call to the desk to get some uniform people up here for security reasons.

MR. [illegible] then came out of the emergency room and I asked him the condition of [illegible]. He advised me that [illegible] had expired. I then notified DETECTIVE [illegible] the information I had just received and told him to call the Police Station. I then got a hold of SGT. [illegible] on the air and advised him that we had a homicide.

A short time later, SGT. [illegible] arrived and took charge of the security within the [illegible]. I was then asked by people in the hospital to remove handcuffs from two of the suspects. I then went into the emergency room while the doctors and nurses were working on the patients and removed the handcuffs. MR. [illegible] then got a hold of me and asked me if I could get a hold of [illegible] [illegible], who is the hospital pathologist so that he could release DETECTIVE [illegible] property to me. Upon getting a hold of MR. [illegible], he did release the property of DETECTIVE [illegible] to me. In giving this property to me it was placed in two bags.

DETECTIVE WALTER [illegible] removed and took possession of the property from the other three wounded persons. I stayed at the emergency room until such time as the suspects were put into other rooms either in the operating room or shifted to a different floor. I then proceeded to the Intensive Care Unit to talk with a RUFUS [illegible]. I then arrived at the Intensive Care Unit and talked with a [illegible] [illegible], along with a FRANK [illegible], who is the Service Coordinator of the Intensive Care Unit and MISS [illegible] is the nurse who is working in the Intensive Care Unit on that day.

A-21662

3283

APPENDIX 1

BEST COPY AVAILABLE

TUCSON POLICE DEPARTMENT SUPPLEMENTARY REPORT

CORRECT-UP REPORT NO. ______

DATE OF ORIGINAL REPORT: OCT. 28, 1974 OFFENSE CLASS: CRIMINAL HOMICIDE/MURDER NARC DRUG LAWS/POSS PAGE 2 OF ____

CONTINUATION OF NARRATIVE:

Upon receiving permission to talk with RUFUS MINCEY, the nurse ELIZABETH GRAHAM did give me a note which she had just received from him. It is unknown what conversation MISS GRAHAM had with him, however, the note said that he knocked at my door, I thought he was cool he had a 38 today. This was signed by MISS GRAHAM and taken into evidence by myself.

On OCTOBER 28TH, 1974, at 2015 hours, I went into interview MR. RUFUS MINCEY at ARIZONA MEDICAL CENTER INTENSIVE CARE UNIT.. At that time present were ELIZABETH B. GRAHAM and a MR. [illegible] SHARP. I asked one of them to be present to witness anything that he may voluntarily give to me. In starting out the conversation I introduced myself as DETECTIVE HUST from the TUCSON POLICE DEPARTMENT and told him that a friend of his CHUCK was in the hospital with a head wound and we had to try to get as much information as we could on this CHUCK, due to the fact we had not contacted any family or did not know the last name. The subject RUFUS MINCEY was laying in the [illegible] being fed intravenously. He also had a tube down his throat, I believe it was some type of [illegible] breathing apparatus, and could not talk under these conditions. The nurse did report, however, that he could write and would write.

Upon my first checking with MR. MINCEY, he appeared to be very alert and could respond to all my questions. On several occasions during the questioning he did roll his eyes back in a manner in which he was thinking of what the answer should be to my questions. After talking to him about the person known as CHUCK and he did write me some notes which a pad was supplied by the nurse. I advised him of his Constitutional Rights off the Miranda Rights Card. That time he nodded his head 'yes' when he was asked if he understood his rights and also "yes" when asked if he would answer my questions.

In regards to his written statement the question and answers which in his own writing will be placed in the Property Section are as follows.

H: Do you know a guy named CHUCK who was shot in the head? I advised him he was in serious condition.
MINCEY: I knew him for two days.

H: Do you know his name?
MINCEY: Dude with the beard?

HUST: Yes, I think so.
MINCEY: CHUCK.

HUST: Do you know his last name or where he lives?
MINCEY: FAIR.

HUST: He lives on FAIR?
MINCEY: He has a ride on the fair in SOUTH TUCSON.

HUST: Who can we get hold of that knows him?
MINCEY: Everybody know everybody.

HUST: I then proceeded to advise him of his Constitutional Rights, also advised him that he was under arrest and charged with killing a police officer. I then went on to
continued...

Officer Reporting ______ Name ______ Division ______

TUCSON / ICE DEPARTMENT SUPPLEMENTAR EPORT

CORRECT-UP REPORT NO. ______

DATE OF ORIGINAL REPORT: OCT. 28, 1974 OFFENSE CLASS: CRIMINAL HOMICIDE/MURDER NARC DRUG LAWS/POSS PAGE 3 OF ____

CONTINUATION OF NARRATIVE:

question him. What do you remember that happened?
MINCEY: I remember somebody standing over me saying "Move nigger, move." I was on the floor beside the bed.

HUST: Do you remember shooting anyone or firing a gun?
MINCEY: This is all I can say without a lawyer.

HUST: If you want a lawyer now, I cannot talk to you any longer, however, you don't have to answer any questions you don't want to. Do you still want to talk to me?
MINCEY: (Shook his head in an affirmative manner.)

HUST: What else can you remember?
MINCEY: I'm gonna have to put my head together. There are so many things that I don't remember I like how did they get into the apartment?

HUST: How did who get into the apartment?
MINCEY: Police.

HUST: Did you sell some narcotics to the guy that was shot?
MINCEY: Do you me, did he give me some money?

HUST: Yes.
MINCEY: No.

HUST: Did you give him a sample?
MINCEY: What do you call a sample?

HUST: A small amount of drug or narcotic to test?
MINCEY: I can't say without a lawyer.

HUST: Did anyone say police or narcs when they come into the apartment?
MINCEY: Let me get myself together first. You see, I'm not for sure everything happened so fast. I can't answer at this time because I don't think so, but I can't say for sure. Some questions aren't clear to me at the present time.

HUST: Did you shoot anyone?
MINCEY: I can't say, I have to see a lawyer.

HUST: Okay, I explained before about an attorney and that you don't have to talk if you don't want to. You can also refuse to answer any individual questions. Are you still willing to talk to me without an attorney present?
MINCEY: (head again yes)

HUST: Do you know what you are charged with?
MINCEY: I am charged with murder, so the policeman says.

HUST: Yes, that's right.
MINCEY: Where is [illegible]?
continued...

Officer Reporting ______ I.D. No. ______ Date ______ Date ______

Name ______ Division ______

TUCSON POLICE DEPARTMENT SUPPLEMENTAL REPORT

CONNECT-UP REPORT NO. _____

DATE OF ORIGINAL REPORT: OCT. 23, 1978 | ORIGINAL CLASS: CRIMINAL HOMICIDE/MURDER MARC DRUG LABS/FOSS | PAGE 1 OF _____

CONTINUATION OF NARRATIVE:

HUNT: She is in. She's in the hospital. She is shot, but she will be alright. Do you know which one the policeman was?
MCKINNEY: I don't know who the policemen are. Which one was the nare?

HUNT: He was the one who took the sample or made a buy and then later came in the bedroom.
MCKINNEY: Did he have one cowboy boots?

HUNT: Yes.
MCKINNEY: There are alot of things that aren't clear.

HUNT: We arrested two other guys.
MCKINNEY: Two guys arrested?

HUNT: Yes.
MCKINNEY: The one with the beard?

HUNT: Yes and JOSE.
MCKINNEY: JOSE! Who else?

HUNT: [illegible] and some 16 year old girl.
MCKINNEY: When do we go to trial?

HUNT: It will be awhile, first you have to get out here.
MCKINNEY: You didn't see anyone else, anybody else?

HUNT: I wasn't there when this happened.
MCKINNEY: No one saw anybody else?

HUNT: Where?
MCKINNEY: In the apartment.

HUNT: I don't know, but I don't think so. Was there suppose to be someone else?
MCKINNEY: We'll get it together.

HUNT: Who is "we"?
MCKINNEY: (points to both myself and him)

HUNT: Will you sign your name on this and write that it was a voluntary and that you didn't want an attorney present.
MCKINNEY: Why?

HUNT: To show it was voluntary and you gave it and you didn't want an attorney present.
MCKINNEY: It's weird, I I can't sign.

HUNT: Ah, it's not weird your nerve and I and FR. [illegible] witnessed it.
MCKINNEY: I have to sign things in the blind. This information was given so that it might not this case to an end.
[illegible] then wrote out something and made me print my name next to it. The question

Given to [illegible] for FBI Date _____ Time _____

Name _____ Person _____

TUCSON POLICE DEPARTMENT SUPPLEMENTAL REPORT

CONNECT-UP REPORT NO. _____

DATE OF ORIGINAL REPORT: OCT. 23, 1978 | ORIGINAL CLASS: CRIMINAL HOMICIDE/MURDER MARC DRUG LABS/FOSS | PAGE 3 OF _____

CONTINUATION OF NARRATIVE:

wrote is, you asked me some questions, and I answered to the best of my ability at the present time. This is not to say I can't change my information at a later date because I'm not sure as of now. At that time I printed my name in the space he left blank on the side. MCKINNEY also wrote a note and this continued from the bottom of page two it will be.

MCKINNEY: This writing was used a means of talking because I could not talk at the time of the interview.
HUNT: Is there anything else you want to tell us?
MCKINNEY: If it is possible to get a lawyer now, we can finish the talk.

HUNT: (He could direct me in the right direction whereas without a lawyer I might say something thinking it means something else. I leave now and let you get some rest.
MCKINNEY: Is it still inside me?

HUNT: I don't know.
MCKINNEY: My right leg, I can't use it. I can't even move it the pain is unbearable.

HUNT: In a couple days, you'll feel better.
MCKINNEY: I'll help you if I can or everyway possible.

then
MCKINNEY also wrote a note on the bottom my name is Lyt. and then crossed that out and then wrote ARI RUFUS J. MCKINNEY, DOCTOR DAVIS MEMORIAL CLINIC. [illegible] 1950 and then stop. Also wrote a note Would you please let someone know where I am. HUNT responded yes, don't worry we'll let them in or and have them contact someone for you. This was the end of the first interview at 2013 hours, 23 OCTOBER 1978.

Initial interview with RUFUS MCKINNEY.

HUNT: RUFUS, I just talked with SGT. [illegible] and he said they had JOSE someone and he is talking. Is there anything else you want to tell us about anyone leaving the apart or following the guy that made the guy out of the apartment. Did JOSE and his girlfriend leave the apartment for a walk?
MCKINNEY: Nobody knew JOSE and his old lady went for a talk to see where CHUCK went. They ca back and said CHUCK was in the car with two guys. One of the guys came with Christ He left and when he came back all hell broke loose.

HUNT: What do you mean "all hell broke loose."?
MCKINNEY: When he came back a bust took place.

HUNT: A what took place? I can't read that word.
MCKINNEY: Bust, bust.

HUNT: Do you know it was a bust?
MCKINNEY: You see, I'm not sure. People were all over the house. I couldn't figure out whether it was a bust or rip off.

HUNT: Did you have a gun in the house, or do you own a gun?
MCKINNEY: I have a gun in the house.

Given to [illegible] for FBI Date _____ Time _____

Name _____ Person _____

CONTINUATION OF NARRATIVE:

HUNT: What kind?
MCKEEVY: 38?.

HUNT: Where do you keep it in the house?
MCKEEVY: No place in prticular. I showed it to CHUCK and he showed me his.

HUNT: What kind of a gun did CHUCK have?
MCKEEVY: Looked like a 38 SP.

HUNT: When this guy left the house, did he take any narcotics with him to his car?
MCKEEVY: Take to the car with him?

HUNT: Yeah, did he leave with drugs or narcotics.
MCKEEVY: He didn't take any drugs out of the apartment, that's for sure.

HUNT: Who did he leave the house with?
MCKEEVY: When he left?

HUNT: Yes.
MCKEEVY: By his self. MCKEEVY signs the paper KEVIN J. MCKEEVY. Underneath he said "I can sign this because I remember these things, not because JOHN is talking some bull shit."

This interview was terminated at 2230 hours, on 10-28-78. Another interview at 2255 hours on 11-28-78.

HUNT: KEVIN, I have a few more questions. I don't think your telling us everything.
MCKEEVY: That's why I have to have time to redo everything that happened in my mind.

HUNT: Who answered the door with the gun?
MCKEEVY: Nobody answered the door with gun.

HUNT: Did JOE! answer the door with a gun?
MCKEEVY: JOE! didn't have a gun.

HUNT: Yes, he did. CHUCK gave him his gun.
MCKEEVY: Do see, that's something on me. I was in the bedroom. Let's me tomorrow, late to date. I can't give facts.

HUNT: I think you can give facts.
MCKEEVY: If something happens that I don't know about why would CHUCK give JOE! his gun if he came with the guy?

HUNT: I don't know.
MCKEEVY: Quote questions I need to know.

HUNT: Go ahead.
MCKEEVY: When I heard all the noise, I run out to check it out. Then I went back to the room.

Other Persons Contacted: _____ Time _____ Date _____

Name _____ Serial _____

CONTINUATION OF NARRATIVE:

HUNT: Where was CHUCK?
MCKEEVY: Where was CHUCK?

HUNT: Yes.
MCKEEVY: (MCKEEVY shrugged his shoulders in a manner of I don't know.)

HUNT: Did this guy that came into the bedroom have a gun?
MCKEEVY: I can't say for sure. Maybe the guy had a gun.

HUNT: I would rather you stop talking to me than lie to me. If your telling the truth your story will be the same as JOHN'S and the others.
MCKEEVY: If I don't tell any lies I don't have to make things up to make the lie look like the truth. Let JOHN talk, all he can do is tell the truth or caught telling a lie. Sure, sure. I want a good lawyer, I'm charged with murder, that's bad whether you did it or not. You don't have to poove you did something. You have to prove you didn't.

HUNT: You wrong about that, we have to prove you did do something.
MCKEEVY: How many dudes came through that door?

HUNT: Dudes?
MCKEEVY: (Circled dudes)

HUNT: Do you mean cops?
MCKEEVY: (Shook his head Yes in an affirmative manner)

HUNT: I heard ten. Get some rest, I'll talk to you tomorrow when you can get that tube out.
MCKEEVY: What time will you come tomorrow.

HUNT: Sometime in the morning.
MCKEEVY: I'll be waiting. I don't have to like. I want some legal guidance.

HUNT: I'll tell you what an attorney will say. He'll tell you to keep your mouth shut.
MCKEEVY: I can't talk now. What good is this doing? Everybody I have said is the truth. There are alot of things left out. After I get a lawyer, you'll come.

HUNT: Yeah, I'll come.
MCKEEVY: I won't lie.

HUNT: Get some rest, I'll see you later.
MCKEEVY: My leg hurt, I dont to try to go to sleep.

HUNT: Okay,
MCKEEVY: Tell DEBBIE that I miss her.

HUNT: Okay.

Before each of these interviews were taken with KEVIN MCKEEVY, I again asked him if he wanted to talk and when I went into to talk to him and always got an affirmative shake of the head to go ahead. After the interviews with MR. MCKEEVY, I talked to DEBBIE MCKEEVY briefly and told her

Other Persons Contacted: _____ Time _____ Date _____

Name _____ Serial _____

TUCSON POLICE DEPARTMENT SUPPLEMENTAL REPORT

CONNECT UP REPORT NO. ______

DATE OF ORIGINAL REPORT: OCT. 28, 1974 — OFFENSE CLASS: CRIMINAL HOMICIDE/MURDER HARD DRUG LAWS/POSS — PAGE 3 OF ___

CONTINUATION OF NARRATIVE:

to her condition she was not able to converse in an intelligent manner and I felt that anything that she would say could be construed as she was under the influence of some type of anesthetics. Therefore, no conversation was held with her that night.

At 0730, on OCTOBER 29, DETECTIVE [illegible] and I again, interviewed MR. [illegible] and MISS JOHNSON. MR. [illegible] was very difficult to understand and no conversation could be carried on for any period due to the fact that he was under the use of oxygen and had a mask on and made it very difficult to converse or receive an answer. MISS JOHNSON stated in her interview that she was lying on the bed when all this happened. She stated to me [illegible] came running into the bedroom and the shooting started. She said she doesn't know who started shooting, but she rolled off the bed and got into the closet so she wouldn't get hit again. She stated MR. [illegible] did have a gun and he kept it loaded under the bed. This statement was terminated and all the notes will be placed in Police Property.

I also talked with a DOCTOR PARREL (PH), on the 29TH at which time I requested a diagram of the track of the bullet on [illegible]. Also the track of the bullet on CHUCK FERGUSON and a track of the bullet on RUFUS [illegible]. DOCTOR PARREL (PH) was very cooperative and did small diagrams for me, which are placed in the case file. The personal effects of BARRY [illegible] were placed in Police Property with the exception of the keys which were in his pockets and they were given to OFFICER [illegible] who had need for them for the parents of BARRY [illegible] to get into his apartment and then they were turned over to SGT. [illegible] of the Narcotic Detail. Also three rings that were removed from BARRY [illegible]'S hands were given to SGT. [illegible] to turn over to the family. All other property was marked and placed there in our Police Property by DETECTIVE [illegible].

Also, in the evening of the 29TH 1974, I received word from DOCTOR [illegible] (PH) who is a doctor at the University of Arizona Medical Center after MR. FERGUSON if I wanted to. At that time he told me MR. FERGUSON was not quite up to date on things that happened and I advised DOCTOR [illegible] that I would not talk to him until he appeared to be fully aware of what was going on around him.

MR. [illegible] (PH) was confronted the following day in the hall way and advised me he requested not to talk to his client. I advised MR. [illegible] (PH), that I would not talk to MR. FERGUSON until I felt such time that MR. FERGUSON had full understanding of what was going on about him.

On NOVEMBER 1ST, I visited both MR. [illegible] and MR. FERGUSON at the hospital, however, MR. [illegible] refused to talk to me without talking to his attorney and MR. FERGUSON at that time I still did not feel was quite capable of answering any questions and he also related to me that he would not answer any questions without his attorney being present. All questioning then was then ceased.

RPT... I recommend this case be CLEARED AND CLOSED with the arrest of RUFUS [illegible] JR.

Officer Reporting [illegible] — Ser. No. 2345 — Date 11-4-74 — Time 1715

Typed [illegible] — Division [illegible]

STATE OF ARIZONA) ss.
COUNTY OF PIMA)

The foregoing instrument is a full, true, and correct copy of the original on file in this office.

Attest: Dec 12 1977

[illegible] Clerk

By [signature]

Lisbeth B. Graham RN

2310 10/28/74

Arizona [illegible] Medical Center

A-21669

2223

L. Her 10-28-74
2015

APPENDIX II

PROGRESS NOTES

UNIVERSITY OF ARIZONA
ARIZONA MEDICAL CENTER
UNIVERSITY HOSPITAL

We were present during the writing of these notes [illegible] 10-28-74 2115

10-28-74
2015

University Hospital

[illegible] present during this interview [illegible] University Hospital 10-28-74 2100

I know him for 2 Days

Bud with Board

Chuck

Said he has a ride at

the fair in South Tucson

Every body knew Every body

I Remember some body Standing over me saying move nigger move I was in the floor beside the bed.

That is all I can say without a lawyer

I'm going to have to put my head together. There are so many things that I don't remember. I like how did they get into the apt.

Place

Began me Did he give me some money (no)

What do you call a sample

I can't say without a lawyer

Let me get my self together first. You see I'm not for sure every thing happened so fast. I can't answer at this time because I don't think so. But I can't say for sure.

Some questions aren't clear to me at the present time. This writing was used a crease of

... of some present during the writing of these notes.
[illegible signatures]
2100
10-28-74

3

ENTER Date & Time	S-Subjective O-Objective A-Assessment P-Plan
Given [illegible] during the interview [illegible] [illegible]	talking because I could not TALK
	at the time of the interview
10-28-74 2100	If It's possible to get a lawyer
	now. we can finish the talk.
	He could direct me in the right Direction
	where as without a lawyer I might
	saw something thinking that it means something
	else. is it still inside me —
	My Right Leg I can't use it
	I can't even move it. The pain
	is unbearable. I'll help you if I can
	in every way possible
	My name is [illegible] A/C Rufus = Mincey
	100 FMS Davis Monthan
	BLKs 4202 B 24.
	3550. [illegible]
	would you please let
	Someone Know where I
	am.

④

UNIVERSITY OF ARIZONA
ARIZONA MEDICAL CENTER
UNIVERSITY HOSPITAL

PROGRESS NOTES

ENTER Date & Time	S-Subjective O-Objective A-Assessment P-Plan
	4 2
[illegible]	I can't say. I have to see a lawyer
	I'm charged with murder so the
	policeman says. [illegible]
	I don't know who the police man was.
	which one was the [illegible]
	Did he have on cowboy boots. —
	There are a lot of things that
	aren't clear. Two guys [illegible]
	the one with the beard
	John, who else —
	when Do we get [illegible]
	You didn't See Anybody else
	No one saw Anybody else In
	the Apt. — We'll get it together
	why — It's void If I don't sign
	I hate to sign things in the Blind
	This information was given
	So that It might bring this case to a end.
(Hust- [illegible])	They asked me some questions: and
	I answered to the best of my ability
	at the present time. This is not
	to say I can't change my Information
	at a later Date, because I'm not
	sure as of now

①

6a

UNIVERSITY OF ARIZONA
ARIZONA MEDICAL CENTER
UNIVERSITY HOSPITAL

FLOW SHEET

[illegible] 12-25-74 [illegible]

[illegible] knew [illegible] + his old lady
went for a week to [illegible]
chuck went. they came back and
said chuck [illegible] in the car with
2 guys. one of the guys came
with chuck. he left and
when he came back all hell
turned loose. then he came
back a [illegible] ~~[illegible]~~ took
place. [illegible] you see
I'm not to sure. [illegible]
was all over the house
I couldn't figure out whether
it was a [illegible] or [illegible] off.
I have a gun in the house
380 it's [illegible] in particular I
showed it to chuck and he showed
me ~~[illegible]~~ his. look like a 38 sp.
Take to the car with him
(he didn't take any drugs
out of the apt) this for sure
when he left by his self.

[signature]

5

I can sign this because I remember
those things. not because [illegible]
is telling some bullshit

(6)

8a

UNIVERSITY OF ARIZONA
ARIZONA MEDICAL CENTER
UNIVERSITY HOSPITAL

FLOW SHEET

Susan present while the pt. voluntarily wrote this. Elizabeth [illegible]
10-28-74 2320

thats why I have To have time to Redo ~~the~~
every thing that happened in my mind

nobody answered Door until

Gun.

John Didn't have a Gun
you see that's something
to me. I was in the
Bed room. Lets
Rap tomorrow face to
face. I can't give facts
If some thing happens that
I don't know about. why
would Chuck give John
his gun if he came
with the guy

Questions I need to
know.
when I heard all the
noise I run out
to Check it out then
I went Back to the
Bed room. where was Chuck
I can't say for sure maybe
the Guy had a Gun

-8-

UNIVERSITY OF ARIZONA
ARIZONA MEDICAL CENTER
UNIVERSITY HOSPITAL

FLOW SHEET

Susan present while the pt. voluntarily wrote this. Elizabeth [illegible]
10-28-74 2320

If I don't Tell any lies I don't
have to make things up to make
the Lie look like the truth. let
John talk. all he can do is tell the
truth or get caught telling a Lie.
Same, Same I want a good Lawyer
I charged with murder thats bad
weather you did it or not. You don't
have to prove you did something
you have to " " didn't

Ohd. how many dudes came
through that door.
what Time will you come tomorrow.
I'll be waiting I don't have to like
I want some Legal guidance
I can't talk now what good
is this doing. Every thing I have said
is the truth. There are a lot of things
left out. After I get a Lawyer
you'll come. I won't Lie
my Leg hurt I want to try to go to sleep
Tell Deb That I miss her

STATE OF ARIZONA } ss.
COUNTY OF PIMA }
The foregoing instrument is a full, true, and correct copy of the original on file in this office.
Attest [illegible]
NORMA M. [illegible], Clerk

Endo—Cont.

Children—2 to 6 years, ½ tablet twice daily.
How Supplied: As oval pink, scored tablets in bottles of 100 and 500.
Oral prescription where permitted by state law.

HYCOMINE® PEDIATRIC Syrup

Description: Each teaspoonful (5 ml) contains:

Hydrocodone bitartrate	2.5 mg

(Warning: May be habit forming)

Homatropine methylbromide	0.75 mg
Pyrilamine maleate	6.25 mg
Phenylephrine hydrochloride	5.0 mg
Ammonium chloride	30.0 mg

Actions: Hydrocodone bitartrate is an effective semisynthetic narcotic antitussive. Phenylephrine hydrochloride provides nasal decongestion.
Indications: To control cough and to provide symptomatic relief of congestion in the upper respiratory tract due to the common cold, pharyngitis, tracheitis, and bronchitis.
Contraindications: Hypersensitivity to any components of the drug, and in patients with glaucoma, pyloric obstruction, or prostatic hypertrophy.
Precautions: Use with caution in diabetes, hyperthyroidism, hypertension and cardiovascular disease. Since blurred vision, drowsiness and dizziness may occur, patients should be cautioned about activities requiring alertness.
Before prescribing antitussive medication to suppress or modify cough, it is important to ascertain that the underlying cause of the cough is identified, that modification of the cough does not increase the risk of clinical or physiologic complications, and that appropriate therapy for the primary disease is provided.
Adverse Reactions: HYCOMINE Syrup is generally well tolerated. Occasional drowsiness, blurred vision, cardiac palpitation, dizziness, nervousness, dryness of the mouth or gastrointestinal upset may occur.
Dosage and Administration:

Children	
4 months to 1 year	10 drops
1 to 3 years	½ teaspoonful (20 drops)
3 to 6 years	½ teaspoonful
6 to 12 years	1 teaspoonful
over 12 years	2 teaspoonfuls

Administer after meals and at bedtime, not less than 4 hours apart.
Supplied: As a green-colored, fruit-flavored syrup.
Oral prescription where permitted by state law.

HYCOMINE® Syrup

Description: Each teaspoonful (5 ml) contains:

Hydrocodone bitartrate	5.0 mg

(Warning: May be habit forming)

Homatropine methylbromide	1.5 mg
Pyrilamine maleate	12.5 mg
Phenylephrine hydrochloride	10.0 mg
Ammonium chloride	60.0 mg

Actions: Hydrocodone bitartrate is an effective semisynthetic narcotic antitussive. Phenylephrine hydrochloride provides nasal decongestion.
Indications: To control cough and to provide symptomatic relief of congestion in the upper respiratory tract due to the common cold, pharyngitis, tracheitis, and bronchitis.
Contraindications: Hypersensitivity to any component of the drug, and in patients with glaucoma, pyloric obstruction, or prostatic hypertrophy.
Precautions: Use with caution in diabetes, hyperthyroidism, hypertension, cardiovascular disease and in the aged. Since blurred vision, drowsiness and dizziness may occur, patients should be cautioned about driving or operating machinery.
Before prescribing antitussive medication to suppress or modify cough, it is important to ascertain that the underlying cause of the cough is identified, that modification of the cough does not increase the risk of clinical or physiologic complications, and that appropriate therapy for the primary disease is provided.
Adverse Reactions: HYCOMINE Syrup is generally well tolerated. Occasional drowsiness, blurred vision, cardiac palpitation, dizziness, nervousness, dryness of the mouth or gastrointestinal upset may occur.
Dosage and Administration: Usual Adult Dose: One teaspoonful after meals and at bedtime, not less than 4 hours apart.
Supplied: As an orange-colored, fruit-flavored syrup.
Oral prescription where permitted by state law.

NARCAN® INJECTION

(Naloxone Hydrochloride)

Description: NARCAN (naloxone hydrochloride), a narcotic antagonist, is a synthetic congener of oxymorphone. In structure it differs from oxymorphone in that the methyl group on the nitrogen atom is replaced by an allyl group.
Each ml of the injectable aqueous solution NARCAN contains:

Naloxone hydrochloride	0.4 mg
Sodium chloride U.S.P.	8.6 mg
Methylparaben and Propylparaben in a ratio of 9 to 1	2.0 mg
Water for injection	q.s. ad 1.0 ml

pH is adjusted with hydrochloric acid.
Naloxone hydrochloride occurs as slightly off-white crystals, and is soluble in water, slightly soluble in alcohol and practically insoluble in ether.
Actions: NARCAN (naloxone hydrochloride) is an essentially pure narcotic antagonist, i.e., it does not possess the "agonistic" or morphine-like properties characteristic of other narcotic antagonists. NARCAN does not produce respiratory depression, psychotomimetic effects or pupillary constriction. In the absence of narcotics or agonistic effects of other narcotic antagonists it exhibits essentially no pharmacologic activity.
In the presence of physical dependence on narcotics NARCAN will produce withdrawal symptoms; it has not been shown to produce tolerance nor to cause physical or psychological dependence.
When NARCAN is administered intravenously the onset of action is generally apparent within two minutes; the onset of action is only slightly less rapid when it is administered subcutaneously or intramuscularly.
Indications: NARCAN is indicated for the complete or partial reversal of narcotic depression, including respiratory depression, induced by natural and synthetic narcotics, and the narcotic-antagonist analgesic, pentazocine. NARCAN is also indicated for the diagnosis of suspected acute opiate overdosage.
Contraindications: NARCAN is contraindicated in patients known to be hypersensitive to it.
Warnings: NARCAN should be administered cautiously to persons who are known or suspected to be physically dependent on narcotics. In such cases an abrupt and complete reversal of narcotic effects may precipitate an acute abstinence syndrome.
The patient who has satisfactorily responded to NARCAN should be kept under continued surveillance and repeated doses of NARCAN should be administered, as necessary, since the duration of action of some narcotics may exceed that of NARCAN.
NARCAN is not effective against respiratory depression due to non-narcotic drugs.
Usage in Neonates: NARCAN has been administered intramuscularly to a limited number of newborn infants in the usual adult dosage of 0.005 mg/kg (5 micrograms/kg) without adverse effects on heart rate, respiratory rate, tidal volume, minute volume, blood pH and P_{CO_2}. However, adequate data to establish the effectiveness of NARCAN in newborns are not available. Further, the concentration of NARCAN is such that dilution would be required. Therefore, use of NARCAN in neonates is not recommended.
Usage in Pregnancy: Safe use of NARCAN during pregnancy (other than labor) has not been established. Animal reproduction studies have not demonstrated teratogenic or other embryotoxic effects (See ANIMAL PHARMACOLOGY AND TOXICOLOGY). However, NARCAN should be administered to pregnant patients only when, in the judgment of the physician, the potential benefits outweigh the possible hazards.
Usage in Children: Safe and effective use in children has not been established.
Precautions: In addition to NARCAN, other resuscitative measures such as maintenance of a free airway, artificial ventilation, cardiac massage, and vasopressor agents should be available and employed when necessary to counteract acute narcotic poisoning.
The use of NARCAN at recommended doses, including administration to surgical and obstetrical patients, has not been associated with hemorrhagic disorder or with abnormal coagulation test results. In an uncontrolled study, elevated partial thromboplastin times (PTT, without bleeding, were reported in several subjects who had received multiple doses totaling more than 20 times the recommended dose. Subsequent single dose studies did not confirm these results. However, should bleeding occur following NARCAN administration, a complete coagulation work-up, including PTT, is indicated.
Adverse Reactions: In rare instances nausea and vomiting have been reported in postoperative patients receiving NARCAN in doses higher than that recommended; a cause and effect relationship has not been established.
Dosage and Administration: NARCAN (naloxone hydrochloride) may be administered intravenously, intramuscularly, or subcutaneously. The most rapid onset of action is achieved by intravenous administration and it is recommended in emergency situations.
The usual initial adult dose is 0.4 mg (1 ml). NARCAN administered I.V., I.M. or S.C. If the desired degree of counteraction and improvement in respiratory function is not obtained immediately, it may be repeated at 2 to 3 minute intervals. Failure to obtain significant improvement after 2 or 3 doses suggests that the condition may be due partly or completely to other disease processes or non-narcotic drugs.
Since the duration of action of some narcotics may exceed that of NARCAN the patient should be kept under continued surveillance and repeated doses of NARCAN should be administered, as necessary.
How Supplied: 0.4 mg/ml of NARCAN (naloxone hydrochloride) for intravenous, intramuscular and subcutaneous administration.

APPENDIX III

Available in 10 ml vials and 1 ml ampuls in boxes of 10 and 100.

Animal Pharmacology and Toxicology: In the mouse and rat the intravenous LD_{50} is 150 ± 5 mg/kg and 108 ± 4 mg/kg respectively. In acute subcutaneous toxicity studies in newborn rats the LD_{50} (95% CL) is 250 (220-280) mg/kg. Subcutaneous injection of 100 mg/kg/day in rats for 3 weeks produced only transient salivation and partial ptosis following injections; no toxic effects were seen at 10 mg/kg/day for 3 weeks.

Reproductive studies including fertility, general reproductive performance, embryotoxicity, teratogenicity, and lactation did not show any abnormality in mice and rats at 10 mg/kg/day.

U.S. Pat. 3,254,088

PERCODAN®
PERCODAN®-DEMI

Description:
Each yellow, scored tablet of PERCODAN contains:

Oxycodone hydrochloride .... 4.50 mg
Warning: May be habit forming
Oxycodone terephthalate .... 0.38 mg
Warning: May be habit forming
Aspirin .... 224 mg
Phenacetin .... 160 mg
Caffeine .... 32 mg

Each pink, scored tablet of PERCODAN-Demi contains:

Oxycodone hydrochloride .... 2.25 mg
Warning: May be habit forming
Oxycodone terephthalate .... 0.19 mg
Warning: May be habit forming
Aspirin .... 224 mg
Phenacetin .... 160 mg
Caffeine .... 32 mg

The oxycodone component is 14-hydroxydihydrocodeinone, a white odorless crystalline powder which is derived from the opium alkaloid, thebaine.

Actions: The principal ingredient, oxycodone, is a semisynthetic narcotic analgesic with multiple actions qualitatively similar to those of morphine; the most prominent of these involve the central nervous system and organs composed of smooth muscle. The principal actions of therapeutic value of the oxycodone in PERCODAN are analgesia and sedation.

Oxycodone is similar to codeine and methadone in that it retains at least one half of its analgesic activity when administered orally.

PERCODAN also contains the non-narcotic antipyretic-analgesics, aspirin and phenacetin.

Indications: For the relief of moderate to moderately severe pain.

Contraindications: Hypersensitivity to oxycodone, aspirin, phenacetin or caffeine.

Warnings:
Drug Dependence: Oxycodone can produce drug dependence of the morphine type and, therefore, has the potential for being abused. Psychic dependence, physical dependence and tolerance may develop upon repeated administration of PERCODAN, and it should be prescribed and administered with the same degree of caution appropriate to the use of other oral narcotic-containing medications. Like other narcotic-containing medications, PERCODAN is subject to the Federal Controlled Substances Act.

Usage in ambulatory patients: Oxycodone may impair the mental and/or physical abilities required for the performance of potentially hazardous tasks such as driving a car or operating machinery. The patient using PERCODAN should be cautioned accordingly.

Interaction with other central nervous system depressants: Patients receiving other narcotic analgesics, general anesthetics, phenothiazines, other tranquilizers, sedative-hypnotics or other CNS depressants (including alcohol) concomitantly with PERCODAN may exhibit an additive CNS depression. When such combined therapy is contemplated, the dose of one or both agents should be reduced.

Usage in pregnancy: Safe use in pregnancy has not been established relative to possible adverse effects on fetal development. Therefore, PERCODAN should not be used in pregnant women unless, in the judgment of the physician, the potential benefits outweigh the possible hazards.

Usage in children: PERCODAN should not be administered to children. PERCODAN-Demi, containing half the amount of oxycodone, can be considered. (See product prescribing information for PERCODAN-Demi.)

Salicylates should be used with caution in the presence of peptic ulcer or coagulation abnormalities.

Precautions:
Head injury and increased intracranial pressure: The respiratory depressant effects of narcotics and their capacity to elevate cerebrospinal fluid pressure may be markedly exaggerated in the presence of head injury, other intracranial lesions or a preexisting increase in intracranial pressure. Furthermore, narcotics produce adverse reactions which may obscure the clinical course of patients with head injuries.

Acute abdominal conditions: The administration of PERCODAN or other narcotics may obscure the diagnosis or clinical course in patients with acute abdominal conditions.

Special risk patients: PERCODAN should be given with caution to certain patients such as the elderly or debilitated, and those with severe impairment of hepatic or renal function, hypothyroidism, Addison's disease, and prostatic hypertrophy or urethral stricture.

Phenacetin has been reported to damage the kidneys when taken in excessive amounts for a long time.

Adverse Reactions: The most frequently observed adverse reactions include light-headedness, dizziness, sedation, nausea and vomiting. These effects seem to be more prominent in ambulatory than in nonambulatory patients, and some of these adverse reactions may be alleviated if the patient lies down.

Other adverse reactions include euphoria, dysphoria, constipation and pruritus.

Dosage and Administration: Dosage should be adjusted according to the severity of the pain and the response of the patient. It may occasionally be necessary to exceed the usual dosage recommended below in cases of more severe pain or in those patients who have become tolerant to the analgesic effect of narcotics. PERCODAN and PERCODAN-Demi are given orally.

PERCODAN: The usual adult dose is one tablet every 6 hours as needed for pain.

PERCODAN-Demi: Adults—One or two tablets every six hours. Children 12 years and older—One-half tablet every six hours. Children 6 to 12 years—One-quarter tablet every six hours. PERCODAN-Demi is not indicated for children under 6 years of age.

Drug Interactions: The CNS depressant effects of PERCODAN may be additive with that of other CNS depressants. See WARNINGS.

Aspirin may enhance the effect of anticoagulants and inhibit the uricosuric effect of uricosuric agents.

Management of Overdosage
Signs and Symptoms: Serious overdose with PERCODAN is characterized by respiratory depression (a decrease in respiratory rate and/or tidal volume, Cheyne-Stokes respiration, cyanosis), extreme somnolence progressing to stupor or coma, skeletal muscle flaccidity, cold and clammy skin, and sometimes bradycardia and hypotension. In severe overdosage, apnea, circulatory collapse, cardiac arrest and death may occur. The ingestion of very large amounts of PERCODAN may, in addition, result in acute salicylate intoxication.

Treatment: Primary attention should be given to the reestablishment of adequate respiratory exchange through provision of a patent airway and the institution of assisted or controlled ventilation. The narcotic antagonists naloxone, nalorphine or levallorphan are specific antidotes against respiratory depression which may result from overdosage or unusual sensitivity to narcotics, including oxycodone. Therefore, an appropriate dose of one of these antagonists should be administered, preferably by the intravenous route, simultaneously with efforts at respiratory resuscitation. Since the duration of action of oxycodone may exceed that of the antagonist, the patient should be kept under continued surveillance and repeated doses of the antagonist should be administered as needed to maintain adequate respiration.

An antagonist should not be administered in the absence of clinically significant respiratory or cardiovascular depression.

Oxygen, intravenous fluids, vasopressors and other supportive measures should be employed as indicated.

Gastric emptying may be useful in removing unabsorbed drug.

How Supplied:
PERCODAN—Yellow, scored tablets in bottles of 100, 500 and 1,000; Hospital blister pack of 25 tablets in units of 250 and 1,000 tablets.

PERCODAN-Demi—Pink, scored tablets in bottles of 100, 500 and 1,000.

[Shown in Product Identification Section]
BNDD Order Form Required.

PERCOGESIC®
Analgesic/Calmative

Composition: Each tablet contains:
Acetaminophen (APAP) .... 325 mg
Phenyltoloxamine citrate .... 30 mg

Uses: For relief of mild to moderate pain and discomfort due to simple headache; for temporary relief of such pain associated with muscle and joint soreness, neuralgia, sinusitis, minor menstrual cramps, the common cold or grippe, toothache, and minor aches and pains of rheumatism and arthritis. The phenyltoloxamine component produces the mild sedation and tranquilization obtained with PERCOGESIC.

Precautions: If arthritic or rheumatic pain persists for more than 10 days in the presence of redness or swelling; or in arthritic or rheumatic conditions affecting children under 12 years of age, consult a physician immediately. When used for the temporary symptomatic relief of colds, if relief does not occur within three days, discontinue use and consult physician. This preparation may cause drowsiness. Do not drive or operate machinery while taking this medication. Do not administer to children under six years of age or exceed recommended dosage unless directed by physician.

Administration and Dosage: Adults: 1 or 2 tablets every 4 hours; maximum daily dose 8 tablets. Children: 6-12 years, one-half adult dose; maximum daily dose 4 tablets. Do not use for more than 10 days unless directed by physician.

How Supplied: Non-narcotic PERCOGESIC tablets (orange) are available in blister-strip boxes of 24 and bottles of 100.

Continued on next page

CRIME INDEX TOTALS

The offenses of murder, forcible rape, robbery, aggravated assault, burglary, larceny-theft, and auto theft are used to establish an Index in the Uniform Crime Reporting Program, to measure the trend and distribution of crime in the United States. These crimes are counted by law enforcement agencies as they become known and are reported on a monthly basis. The Crime Index offenses were selected as a measuring device because, as a group, they represent the most common local crime problem. They are all serious crimes, either by their very nature or due to the volume in which they occur. The offenses of murder, forcible rape, aggravated assault, and robbery make up the violent crime category. The offenses of burglary, larceny-theft, and auto theft make up the property crime category.

Law enforcement does not purport to know the total volume of crime, because of the many criminal actions which are not reported to official sources. Estimates as to the level of unreported crime can be developed through costly victim surveys but this does not eliminate the reluctance of the victim to report all criminal actions to law enforcement agencies. In light of this situation, the best source for obtaining useable crime counts is the next logical universe which is the offenses known to the police. The crimes used in the Crime Index are those considered to be most constantly reported and provide the capability to compute meaningful crime trends and crime rates.

The crime counts used in the Crime Index and set forth in this publication are based on actual offenses established by police investigation. When the law enforcement agency receives a complaint of a criminal matter and the follow-up investigation discloses no crime occurred it is "unfounded." On a national average, police investigations "unfound" 4 percent of the complaints concerning Crime Index offenses ranging from 2 percent in the larceny classification to 15 percent in the forcible rape classification. These unfounded complaints are eliminated from the crime counts.

During calendar year 1973, an estimated 8,638,400 Crime Index offenses were reported to law enforcement agencies. This includes total larceny-theft which was used as an Index offense in 1973. Total larceny-theft replaces the "larceny $50 and over" offense category which was previously utilized as an Index offense. All data in this publication uses total larceny-theft for comparative periods. There is a 6 percent increase in estimated volume of Index offenses, 1973 over 1972. The violent crime category made up 10 percent of the Crime Index total and increased 5 percent in volume over 1972. Murder increased 5 percent, forcible rape 10 percent, and aggravated assault 7 percent. Robbery increased 2 percent. The voluminous property crimes as a group increased 6 percent. Auto theft increased 5 percent, larceny-theft increased 5 percent, and burglary was up 8 percent.

Since 1968, the violent crimes as a group have increased 47 percent and the property crimes 28 percent. Crime, as measured by the Crime Index offenses' has risen 30 percent in volume during this five-year period.

The estimated 1973 crime figures for the United States are set forth in the following table titled, "National Crime, Rate, and Percent Change."

National Crime, Rate, and Percent Change

Crime Index Offenses	Estimated crime 1973		Percent change over 1972		Percent change over 1968		Percent change over 1960	
	Number	Rate per 100,000 inhabitants	Number	Rate	Number	Rate	Number	Rate
Total	8,638,400	4,116.4	+5.7	+4.9	+30.7	+23.5	+157.8	+130.3
Violent	869,470	414.3	+4.9	+4.1	+47.2	+40.2	+[illegible]	+[illegible]
Property	7,768,900	3,702.1	+5.8	+5.0	+28.0	+21.3	+152.2	+[illegible]
Murder	19,510	9.3	+5.2	+4.5	+42.2	+34.6	+115.8	+95.8
Forcible rape	51,000	24.3	+9.7	+9.0	+62.1	+54.5	+190.2	+155.6
Robbery	382,680	182.4	+2.1	+1.3	+46.2	+39.2	+256.2	+204.5
Aggravated assault	416,270	198.4	+7.0	+6.2	+46.7	+39.7	+172.6	+137.9
Burglary	2,540,900	1,210.8	+8.0	+7.2	+58.0	+51.4	+181.3	+146.3
Larceny-theft	4,304,400	2,051.2	+4.7	+3.9	+24.8	+18.7	+134.3	+109.3
Auto theft	923,600	440.1	+4.7	+3.9	+18.5	+12.9	+162.0	+141.6

APPENDIX IV

Table 5.—Index of Crime, 1973, Standard Metropolitan Statistical Areas—Continued

Standard Metropolitan Statistical Area	Population	Total crime index	Violent crime	Property crime	Murder and nonnegligent manslaughter	Forcible rape	Robbery	Aggravated assault	Burglary	Larceny-theft	Auto theft
Tallahassee, Fla.	[illegible],000										
(Includes Leon and Wakulla Counties.)											
Area actually reporting	100.0%	5,3[illegible]	7[illegible]	[illegible]	10	[illegible]	[illegible]	[illegible]	1,14[illegible]	[illegible]	27[illegible]
Rate per 100,000 inhabitants		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Tampa-St. Petersburg, Fla.	1,2[illegible],000										
(Includes Hillsborough, Pasco and Pinellas Counties.)											
Area actually reporting	100.0%	7[illegible]	7,1[illegible]	[illegible]	131	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Terre Haute, Ind.	174,000										
(Includes Clay, Sullivan, Vermillion and Vigo Counties.)											
Area actually reporting	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	1,7[illegible]	[illegible]	[illegible]
Estimated total	100.0%	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	1,777	2,743	[illegible]
Rate per 100,000 inhabitants		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Toledo, Ohio-Mich.	77[illegible],000										
(Includes Fulton, Lucas, Ottawa and Wood Counties, Ohio, and Monroe County, Mich.)											
Area actually reporting	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	1,477	[illegible]	[illegible]	[illegible]	[illegible]
Estimated total	100.0%	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Topeka, Kans.	[illegible],000										
(Includes Jefferson, Osage and Shawnee Counties.)											
Area actually reporting	100.0%	7,313	[illegible]	7,4[illegible]	[illegible]	[illegible]	130	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Trenton, N.J.	[illegible],000										
(Includes Mercer County.)											
Area actually reporting	100.0%	[illegible]	[illegible]	[illegible]	[illegible]	77	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Tucson, Ariz.	[illegible],000										
(Includes Pima County.)											
Area actually reporting	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Estimated total	100.0%	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Tulsa, Okla.	[illegible]										
(Includes Creek, Mayes, Osage, Rogers, Tulsa and Wagoner Counties.)											
Area actually reporting	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Estimated total	100.0%	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Tuscaloosa, Ala.	[illegible],000										
(Includes Tuscaloosa County.)											
Area actually reporting	100.0%	[illegible]	[illegible]	[illegible]	11	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Utica-Rome, N.Y.	[illegible],000										
(Includes Herkimer and Oneida Counties.)											
Area actually reporting	[illegible]	[illegible]	[illegible]	[illegible]	11	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	411
Estimated total	100.0%	[illegible]	[illegible]	[illegible]	11	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Vallejo-Fairfield-Napa, Calif.	[illegible],000										
(Includes Napa and Solano Counties.)											
Area actually reporting	100.0%	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Vineland-Millville-Bridgeton, N.J.	[illegible],000										
(Includes Cumberland County.)											
Area actually reporting	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Estimated total	100.0%	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Waco, Tex.	[illegible],000										
(Includes McLennan County.)											
Area actually reporting	100.0%	7,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

See footnotes at end of table.

National Crime, Rate, and Percent Change

Crime index offenses	Estimated crime 1974		Percent change over 1973		Percent change over 1969		Percent change over 1960	
	Number	Rate per 100,000 inhabitants	Number	Rate	Number	Rate	Number	Rate
Total	10,192,000	4,821.4	+17.6	+16.7	+38.2	+31.8	+[illegible]	+[illegible]
Violent	969,820	458.8	+11.3	+10.5	+47.2	+40.3	+[illegible]	+[illegible]
Property	9,222,300	4,362.6	+18.3	+17.5	+37.5	+31.0	+199.7	+134.2
Murder	20,600	9.7	+5.5	+4.3	+40.3	+[illegible]	+127.4	+96.2
Forcible rape	55,210	26.1	+7.8	+7.0	+49.0	+41.3	+226.4	+174.7
Robbery	441,290	208.8	+15.1	+14.3	+48.0	+41.1	+310.2	+[illegible]
Aggravated assault	452,720	214.2	+8.5	+7.7	+46.6	+39.7	+[illegible]	+[illegible]
Burglary	3,020,700	1,429.0	+18.5	+17.6	+53.3	+46.1	+[illegible]	+[illegible]
Larceny—theft	5,227,700	2,473.0	+21.0	+20.2	+45.3	+38.9	+182.6	+148.6
Motor vehicle theft	972,800	460.6	+5.2	+4.4	+11.2	+5.9	+197.7	+[illegible]

only the numerical factor of population and does not incorporate any of the other elements which contribute to the amount of crime in a given area. Tables disclose that the varying crime experiences, especially in large cities and suburban communities, are affected by a complex set of involved factors and are not solely related to numerical population differences.

Crime Rate by Region, 1974

(Rate per 100,000 inhabitants)

Crime index offenses	Northeastern States	North Central States	Southern States	Western States
Total	4,277.5	4,661.6	4,252.7	5,901.1
Violent	436.7	429.5	447.0	507.2
Property	3,841.9	4,232.1	3,805.7	5,393.9
Murder	7.6	8.5	12.3	9.3
Forcible rape	20.7	24.7	28.1	38.3
Robbery	278.4	221.9	180.8	195.4
Aggravated assault	130.1	174.9	225.0	252.2
Burglary	1,264.2	1,287.2	1,240.9	1,829.9
Larceny-theft	1,975.6	2,520.3	2,150.6	3,207.7
Motor vehicle theft	601.2	424.5	223.2	546.7

Crime Rate by Area, 1974

(Rate per 100,000 inhabitants)

Crime index offenses	Area			
	Total U.S.	Metropolitan areas	Rural	Other cities
Total	4,821.4	5,621.6	1,746.5	4,657.3
Violent	458.8	556.4	151.2	283.2
Property	4,362.6	5,065.2	1,595.3	4,377.9
Murder	9.7	10.6	7.6	5.7
Forcible rape	26.1	31.2	11.6	14.4
Robbery	208.8	273.7	20.4	84.2
Aggravated assault	214.2	241.0	111.5	173.9
Burglary	1,429.0	1,692.8	[illegible]	1,328.9
Larceny-theft	2,473.0	2,820.9	[illegible]	2,648.3
Motor vehicle theft	460.6	575.4	41.8	330.6

The tables set forth on this page reveal the variations in crime experienced by metropolitan areas, rural areas, and other cities.

The crime rates set forth in the National Crime Rate and Percent Change table for each of the Crime Index offenses show a variation from a 20 percent increase in larceny-theft to a 4 percent increase in murder. The number of crimes per unit of population is highest in the large metropolitan centers.

The accompanying charts illustrate the trend of crime in the United States from 1969 through 1974 by showing percent changes in volume and crime rate together with the population increase. Separate charts provide similar information relative to crimes of violence and crimes against property. Since 1969, the violent crime rate has increased 40 percent and the property crime rate increased 31 percent. The violent crime group includes murder, forcible rape, robbery, and aggravated assault offenses. The property crime category is made up of burglary, larceny-theft, and motor vehicle theft offenses.

MURDER AND NONNEGLIGENT MANSLAUGHTER

This Crime Index offense is defined in Uniform Crime Reporting as the willful killing of another. The classification in this offense, as in all of the other Crime Index offenses, is based solely on police investigation as opposed to the determination of a court, medical examiner, coroner, jury, or other judicial body.

Deaths caused by negligence, suicide, accident, or justifiable homicide are not included in the count for this offense classification. Attempts to murder or assaults to murder are scored as aggravated assaults and not as murder.

Table 5.—Index of Crime, 1974, Standard Metropolitan Statistical Areas—Continued

Standard Metropolitan Statistical Area	Population	Total Crime Index	Violent crime	Property crime	Murder and nonnegligent manslaughter	Forcible rape	Robbery	Aggravated assault	Burglary	Larceny-theft	Motor vehicle theft
Toledo, Ohio-Mich.	778,344										
(Includes Fulton, Lucas, Ottawa and Wood Counties, Ohio and Monroe County, Mich.)											
Area actually reporting	94.0%	40,689	3,233	37,456	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Estimated total	100.0%	42,068	3,310	38,758	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		5,404.1	425.0	4,979.1	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Topeka, Kans.	190,282										
(Includes Jefferson, Osage and Shawnee Counties.)											
Area actually reporting	100.0%	9,171	594	8,579	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		4,787.8	309.3	4,458.5	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Trenton, N.J.	316,483										
(Includes Mercer County.)											
Area actually reporting	100.0%	17,222	1,928	15,294	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		5,474.7	609.7	4,864.0	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Tucson, Ariz.	437,980										
(Includes Pima County.)											
Area actually reporting	100.0%	37,297	1,989	34,734	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		8,308.1	371.6	7,926.5	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Tulsa, Okla.	575,425										
(Includes Creek, Mayes, Osage, Rogers, Tulsa and Wagoner Counties.)											
Area actually reporting	96.4%	29,554	2,071	27,528	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Estimated total	100.0%	30,042	2,078	27,964	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		5,220.6	361.0	4,860.0	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Tuscaloosa, Ala.	128,639										
(Includes Tuscaloosa County.)											
Area actually reporting	100.0%	3,462	324	3,148	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		2,687.2	278.9	2,445.3	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Utica-Rome, N.Y.	332,723										
(Includes Herkimer and Oneida Counties.)											
Area actually reporting	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Estimated total	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Vallejo-Fairfield-Napa, Calif.	[illegible]										
(Includes Napa and Solano Counties.)											
Area actually reporting	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Vineland-Millville-Bridgeton, N.J.	[illegible]										
(Includes Cumberland County.)											
Area actually reporting	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Waco, Tex.	[illegible]										
(Includes McLennan County.)											
Area actually reporting	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Estimated total	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Washington, D.C.-Md.-Va.	[illegible]										
(Includes District of Columbia, Charles, Montgomery and Prince Georges Counties, Md., Alexandria, Fairfax and Falls Church Cities and Arlington, Fairfax, Loudoun and Prince William Counties, Va.)											
Area actually reporting	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Estimated total	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Waterloo-Cedar Falls, Iowa	[illegible]										
(Includes Black Hawk County.)											
Area actually reporting	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
West Palm Beach-Boca Raton, Fla.	[illegible]										
(Includes Palm Beach County.)											
Area actually reporting	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Rate per 100,000 inhabitants		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

See footnotes at end of table.

National Crime, Rate, and Percent Change

Crime index offenses	Estimated crime 1975		Percent change over 1974		Percent change over 1970		Percent change over 1960	
	Number	Rate per 100,000 inhabitants	Number	Rate	Number	Rate	Number	Rate
Total	11,256,600	5,281.7	+9.8	+9.0	+38.0	+32.6	+232.6	+179.9
Violent	1,026,280	481.5	+5.3	+4.4	+39.9	+33.5	+214.4	+196.3
Property	10,230,300	4,800.2	+10.3	+9.4	+38.0	+32.6	+235.5	+178.1
Murder	20,510	9.6	-1.3	-1.0	+28.2	+21.3	+125.1	+94.2
Forcible rape	56,090	26.3	+1.3	+.6	+47.6	+40.9	+229.3	+174.0
Robbery	464,970	218.2	+5.1	+4.3	+32.9	+26.8	+321.3	+282.1
Aggravated assault	484,710	227.4	+6.3	+5.5	+46.7	+38.0	+211.1	+184.1
Burglary	3,252,100	1,525.9	+7.0	+6.1	+47.3	+40.8	+256.6	+220.0
Larceny-theft	5,977,700	2,804.8	+13.6	+12.7	+41.3	+34.8	+222.2	+171.1
Motor vehicle theft	1,000,500	469.4	+2.4	+1.6	+7.8	+3.6	+204.8	+136.8

Regionally, in 1973, the Northeastern States reported an 11 percent increase in crime, the North Central States a 9 percent increase, the Southern States a 12 percent increase, and the Western States an increase of 7 percent.

Crime rates relate the incidence of reported crime to population. A crime rate may be viewed as a victim risk rate. Crime rates used are based on Crime Index offenses.

The Crime Index rate of the United States in 1975 was 5,282 per 100,000 inhabitants. This was a 9 percent increase from the crime rate of 4,850 per 100,000 inhabitants in 1974. The national crime rate, or the risk of being a victim of one of these crimes, has increased 33 percent since 1970. Many factors influence the nature and extent of crime in a particular community. A number of these factors are shown on page v of this publication. A crime rate takes into consideration only the numerical factor of population and does not incorporate any of the other elements which contribute to the amount of crime in a given area. Tables disclose that the varying crime experiences, especially in large cities and suburban communities, are affected by a complex set of involved factors and are not solely related to numerical population differences.

The tables set forth here reveal the variations in crime experienced by metropolitan areas, rural areas, and other cities.

The crime rates set forth in the National Crime Rate and Percent Change table for each of the Crime Index offenses show a variation from a 13 percent increase in larceny-theft to a 2 percent decrease in murder. The number of crimes per unit of population is highest in the large metropolitan centers.

Crime Rate by Region, 1975

[Rate per 100,000 inhabitants]

Crime index offenses	Northeastern States	North Central States	Southern States	Western States
Total	4,931.8	5,381.2	4,947.3	6,423.7
Violent	538.4	416.8	485.6	547.1
Property	4,393.4	4,964.6	4,267.3	5,876.6
Murder	7.8	8.1	13.7	9.0
Forcible rape	21.0	26.1	28.8	37.6
Robbery	330.4	207.2	186.8	216.3
Aggravated assault	179.4	177.2	251.8	284.0
Burglary	1,448.0	1,332.3	1,473.1	2,059.4
Larceny-theft	2,326.7	2,911.0	2,582.2	3,738.2
Motor vehicle theft	662.5	421.4	223.8	508.6

Crime Rate by Area, 1975

[Rate per 100,000 inhabitants]

Crime index offenses	Total U.S.	Metropolitan areas	Rural	Other cities
Total	5,281.7	6,110.3	1,987.2	4,427.2
Violent	481.5	582.6	157.3	288.1
Property	4,800.2	5,528.7	1,829.9	4,139.1
Murder	9.6	10.6	8.1	5.3
Forcible rape	26.3	31.3	12.0	12.6
Robbery	218.2	284.0	23.5	87.6
Aggravated assault	227.4	254.8	123.7	182.2
Burglary	1,525.9	1,747.8	788.8	1,165.3
Larceny-theft	2,804.8	3,186.4	946.8	2,848.2
Motor vehicle theft	469.4	594.2	103.4	216.3

The accompanying charts illustrate the trend of crime in the United States from 1970 through 1975 by showing percent changes in volume and crime rate together with the population increase. Separate charts provide similar information relative to crimes of violence and crimes against property. Since 1970, the violent crime rate has

Table 5.—Index of Crime, 1975, Standard Metropolitan Statistical Areas—Continued

Standard Metropolitan Statistical Area	Population	Total Crime Index	Violent crime[1]	Property crime[1]	Murder and non-negligent man-slaughter	Forcible rape	Robbery	Aggravated assault	Burglary	Larceny-theft	Motor vehicle theft
Springfield, Ill.	177,699										
(Includes Menard and Sangamon Counties.)											
Area actually reporting	100.0%	9,575	394	9,182	6	29	215	144	3,322	5,189	671
Rate per 100,000 inhabitants		5,391.5	221.8	5,170.0	3.4	16.3	121.1	81.1	1,870.5	2,921.7	377.8
Springfield, Mo.	186,253										
(Includes Christian and Greene Counties.)											
Area actually reporting	100.0%	11,276	418	10,858	7	19	130	262	2,878	7,641	339
Rate per 100,000 inhabitants		6,053.5	224.4	5,829.0	3.8	10.2	70.1	140.8	1,545.7	4,102.4	182.0
Springfield-Chicopee-Holyoke, Mass.	583,377										
(Includes Hampden and Hampshire Counties.)											
Area actually reporting	88.0%	30,731	2,238	28,543	8	66	741	1,544	9,052	12,813	4,707
Estimated total	100.0%	31,340	2,384	28,958	8	67	751	1,560	10,144	13,861	4,909
Rate per 100,000 inhabitants		5,350.2	407.6	4,977.5	1.4	11.2	128.7	266.3	1,733.6	2,368.1	838.0
Stockton, Calif.	283,650										
(Includes San Joaquin County.)											
Area actually reporting	100.0%	23,589	1,014	22,225	34	88	788	919	6,630	14,224	1,371
Rate per 100,000 inhabitants		8,252.0	356.6	7,894.3	11.2	29.7	223.4	262.3	2,285.6	4,720.2	483.4
Syracuse, N.Y.	648,412										
(Includes Madison, Onondaga, and Oswego Counties.)											
Area actually reporting	76.6%	28,760	1,584	27,182	15	69	688	812	6,048	16,994	1,340
Estimated total	100.0%	28,815	1,586	27,229	15	70	689	812	8,061	17,015	1,153
Rate per 100,000 inhabitants		4,443.9	244.6	4,199.3	2.3	12.2	101.6	128.4	1,235.7	2,624.1	238.5
Tacoma, Wash.	419,222										
(Includes Pierce County.)											
Area actually reporting	100.0%	24,180	2,003	22,177	34	239	627	1,103	7,080	12,677	1,620
Rate per 100,000 inhabitants		5,768.3	477.7	5,290.6	8.1	57.0	149.6	263.0	1,902.0	3,023.1	365.5
Tallahassee, Fla.	129,594										
(Includes Leon and Wakulla Counties.)											
Area actually reporting	100.0%	10,234	625	10,109	18	59	245	351	3,089	6,330	441
Rate per 100,000 inhabitants		7,515.9	488.7	7,226.2	13.6	43.0	173.1	258.1	2,185.6	4,698.5	342.6
Tampa-St. Petersburg, Fla.	1,281,129										
(Includes Hillsborough, Pasco, and Pinellas Counties.)											
Area actually reporting	99.7%	102,697	9,047	94,015	133	488	3,275	5,121	32,258	56,722	5,035
Estimated total	100.0%	103,428	9,070	94,358	133	489	3,288	5,125	32,262	56,161	5,044
Rate per 100,000 inhabitants		7,488.3	586.7	6,881.7	11.1	38.1	257.7	371.8	2,418.5	4,080.9	366.2
Terre Haute, Ind.	178,643										
(Includes Clay, Sullivan, Vermillion, and Vigo Counties.)											
Area actually reporting	93.2%	5,752	203	5,549	12	11	107	73	2,202	3,070	477
Estimated total	100.0%	5,741	254	5,467	14	16	125	98	2,221	3,626	581
Rate per 100,000 inhabitants		3,027.9	144.6	3,093.3	8.0	9.1	72.9	54.7	1,221.[illegible]	2,052.5	318.4
Toledo, Ohio-Mich.	753,327										
(Includes Fulton, Lucas, Ottawa, and Wood Counties, Ohio and Monroe County, Mich.)											
Area actually reporting	96.0%	47,597	3,126	44,431	60	248	1,790	1,081	11,7[illegible]	30,331	2,310
Estimated total	100.0%	48,116	3,236	45,386	61	250	1,610	1,087	12,088	30,683	2,387
Rate per 100,000 inhabitants		6,191.8	408.4	5,752.2	7.8	31.9	221.6	128.7	1,520.9	3,941.4	295.1
Topeka, Kans.	186,698										
(Includes Jefferson, Osage, and Shawnee Counties.)											
Area actually reporting	100.0%	10,703	789	9,943	12	58	185	496	2,348	6,634	291
Rate per 100,000 inhabitants		5,473.0	386.2	5,066.7	6.1	22.8	98.7	248.6	1,287.0	2,296.3	184.6
Trenton, N.J.	314,018										
(Includes Mercer County.)											
Area actually reporting	100.0%	16,377	1,300	16,737	18	77	588	426	5,201	9,131	1,773
Rate per 100,000 inhabitants		5,218.0	403.8	5,215.4	6.0	24.4	308.3	186.7	1,693.3	2,896.2	562.0
Tucson, Ariz.	446,591										
(Includes Pima County.)											
Area actually reporting	100.0%	41,417	2,471	38,746	36	196	898	1,347	12,736	23,481	2,584
Rate per 100,000 inhabitants		9,274.7	554.9	8,628.8	8.0	44.1	186.2	344.6	2,851.4	5,038.3	585.1

See footnote at end of table.

Table 5.—Index of Crime, 1975, Standard Metropolitan Statistical Areas—Continued

See footnote at end of table.

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Please notify the court at once if you conclude that other physical arrangements are necessary for the proper conduct of the examination, or if additional expert assistance is necessary for an adequate determination of any of the above matters.

Date

Superior Court Judge

Form XVI. Omnibus hearing form

[CAPTION]

OMNIBUS HEARING FORM

The state of Arizona and the defendants in this action, by their attorneys, if any, hereby certify that they have conferred concerning the issues involved in this matter and report to the court as follows:

☐ That the parties are prepared for the omnibus hearing set for _____ and have indicated herein the matters which they will raise.

☐ That the parties have reached an agreement as to the disposition of this case, which will be submitted to the court for its approval on the date set for the omnibus hearing.

☐ That the parties conclude, after conferring, that no motions specified herein will be urged in this case, and therefore, request the court to vacate the omnibus hearing set for _____ both parties recognizing in so doing that they are hereafter precluded from raising any matter specified herein, except as provided in Rule 16.1(b).

☐ That the parties request the court to set the following matter for evidentiary hearing at the omnibus hearing, for reasons set forth in Attachment ____:

☐ That a request for change of judge is made herein.

☐ Other. See Attachment ____

All parties hereby certify that they have reviewed the entire omnibus hearing form and know of no motion or issue specified in the form which they desire to raise at any time during this case other than those noted. Counsel for the defendant hereby certifies that he knows of no problems concerning the securing of evidence, including statements or confessions of the defendant, identifications of the defendant, and results of a search and seizure, electronic surveillance, or arrest, or any other constitutional issues raisable by any of the

(Pages 737-739 omitted)

APPENDIX V

☐ ☐ 12. To suppress evidence based on unlawfulness of an arrest.

☐ ☐ 13. To suppress evidence based on unlawfulness of a search or seizure.

☐ ☐ 14. To suppress evidence based on unlawfulness of an identification.

☐ ☐ 15. To determine the admissibility of evidence (motion in limine), to wit: _____

_____

☐ ☐ 16. To modify the conditions of release.

☐ ☐ 17. To request subpoena of an out-of-state witness.

☐ ☐ 18. To require a material witness to enter into an undertaking under Ariz.Rev.Stat.Ann. §§ 13–1841 and –1842.

☐ ☐ 19. Other, specified on Attachment _____

III. STIPULATIONS

The parties agree to be bound, for purposes of this proceeding only, to the following facts:

☐ That the defendant was convicted of the following offenses, which shall be considered prior convictions without production of a certified copy or witnesses to the conviction:

Offense_____	Offense_____	Offense_____
_____	_____	_____
Place_____	Place_____	Place_____
_____	_____	_____
Date_____	Date_____	Date_____
_____	_____	_____

☐ That if _____ were called and sworn as a witness he or she should testify that he or she was the owner of the motor vehicle, on the date, referred to in the indictment or information and that on or about that date the motor vehicle (disappeared or was stolen) (was opened or broken into) (was tampered with) and that he or she never gave the defendant or any other person permission to take, enter, or tamper with the motor vehicle.

☐ That the substance referred to in the indictment or information is _____ and its weight is _____

☐ That there has been a continuous chain of custody in government agents from _____ to _____ of the following: _____

_____

_____

Form XV –2. Notice of appointment of mental health expert

[CAPTION]

NOTICE OF APPOINTMENT

TO: _____

YOU ARE HEREBY APPOINTED TO serve as a mental health expert in this case on behalf of _____ to examine the mental condition of _____ who is charged with the crime of _____ and can be reached at _____

_____

and thereafter to prepare and send to the clerk of the court a written report of your findings and hold yourself available to testify in court concerning them.

Your report to this court is to include the following items:

(1) The probable mental condition of the defendant at the time he committed the offense; and

(2) If you determine that he probably suffered from a mental disease or defect at that time, the relation of such disease or defect to the alleged offense.

Please notify the court at once if you conclude that other physical arrangements are necessary for the proper conduct of the examination, or if additional expert assistance is necessary for an adequate determination of any of the above matters.

_____ _____

Date Superior Court Judge

Amended, effective Aug. 1, 1975.

Form XVI. Omnibus hearing form

[CAPTION]

OMNIBUS HEARING FORM

The state of Arizona and the defendants in this action, by their attorneys, if any, hereby certify that they have conferred concerning the issues involved in this matter and report to the court as follows:

☐ That the parties are prepared for the omnibus hearing set for _____ and have indicated herein the matters which they will raise.

☐ That the parties have reached an agreement as to the disposition of this case, which will be submitted to the court for its approval on the date set for the omnibus hearing.

☐ That the parties conclude, after conferring, that no motions specified herein will be urged in this case, and therefore, request the court to vacate the omnibus hearing set for _____; both parties recognize in so doing that they are hereafter precluded from raising any matter specified herein, except as provided in Rule 16.

☐ That the parties request the court to set the following matter for evidentiary hearing at the omnibus hearing, for reasons set forth in Attachment _____

_____

(Pages 240–41 omitted.)

II. ISSUES WHICH WILL BE RAISED IN THE CASE

The parties hereby notify the court and each other of their intention to raise the following issues in this case: [Check motions which will be made in box of party which will make the motion; if uncontested, check both boxes.]

State	Defendant		
☐	☐	1.	To challenge the jurisdiction of the court.
☐	☐	2.	To dismiss an information or indictment under Rule 16.7 on the grounds that: _____
☐	☐	3.	To review the determination of probable cause under Rule 5.5/Rule 12.9.
☐	☐	4.	To disqualify a judge under Rule 10.1/Rule 10.2.
☐	☐	5.	To change the place of trial under Rule 10.3.
☐	☐	6.	To withdraw as counsel under Rule 6.3.
☐	☐	7.	To request a determination of defendant's competency/sanity, under Rule 11. _____
☐	☐	8.	To request a determination of defendant's sanity under Rule 11. _____
☐	☐	9.	To amend an information or indictment under Rule 13.5.
☐	☐	10.	To sever defendants or counts under Rule 13.4.
☐	☐	11.	To consolidate defendants or counts under Rule 13.3(c).
☐	☐	12.	To determine the voluntariness of a statement made by the defendant, to wit: _____
☐	■	13.	To suppress evidence based on unlawfulness of an arrest.
☐	■	14.	To suppress evidence based on unlawfulness of a search or seizure. _____
☐	☐	15.	To suppress evidence based on unlawfulness of an identification.
☐	☐	16.	To determine the admissibility of evidence (motion in limine), to wit: _____
☐	☐	17.	To modify the conditions to release.
☐	☐	18.	To request subpoena of an out-of-state witness.
☐	☐	19.	To require a material witness to enter into an undertaking under Ariz.Rev.Stat.Ann. §§ 13-1841 and -1842.
☐	☐	20.	Other, specified on Attachment _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-5353

RUFUS JUNIOR MINCEY, Petitioner

-vs-

STATE OF ARIZONA, Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF ARIZONA

REPLY BRIEF FOR THE PETITIONER

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Attorneys for Petitioner

February, 1978

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CASES

IN THE SUPREME COURT OF THE UNITED STATES

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NO. 77-5353

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-vs-

STATE OF ARIZONA, Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF ARIZONA

REPLY BRIEF FOR THE PETITIONER

ARGUMENTS I AND II

I

THE ADMISSION OF EVIDENCE OBTAINED IN A FOUR DAY WARRANTLESS SEARCH OF MR. MINCEY'S RESIDENCE AFTER THE RESIDENCE HAD BEEN SECURED BY POLICE VIOLATED MR. MINCEY'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

A. ARIZONA'S MURDER SCENE EXCEPTION VIOLATES THE PRINCIPLES OF THE FOURTH AMENDMENT.

The Respondent argues that Arizona's "murder scene exception" is constitutional in that it is "reasonable" and there is a "public need" for an exception to the warrant requirement. Respondent argues as though there were no long line of cases establishing the purposes of the Fourth Amendment, the general application of the warrant requirement, and the purposes of the warrant requirement. It is as if Respondent believes that the Fourth Amendment requires only some vague balancing test which yields to every assertion of police

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expediency. Nowhere in Respondent's Brief are the purposes of the warrant requirement mentioned or discussed. Compare Pet. Br. 12-14.

The Respondent argues, in effect, (1) that homicides and severe batteries are serious matters, (2) that there is some undefined need for an immediate, expedient search in all such cases which cannot be forestayed by the necessity of obtaining a judicial warrant, and (3) that "common sense" dictates that when a police officer discovers what he believes to be the scene of a crime, he proceeds to investigate and search the scene. If these are sufficient justifications for Arizona's exception, they are equally applicable to crime investigation in general and would justify the discarding of the warrant requirement.

The search of Mr. Mincey's home began on October 28, 1974, a Monday, during regular court business hours. In Arizona a judicial search warrant may be obtained at any time by as simple a means of communication as a telephone call. 5 Ariz.Rev. Stat. Ann. §13-1444(C)(Supp. 1977). Nowhere in Respondent's Brief does Respondent give a single concrete example of any injury which might have been done to the prosecution had the search been delayed long enough to obtain a telephonic search warrant--assuming arguendo, of course, that probable cause for such a search could have been found

1. The failure herein to specifically mention any specific allegation, citation of authority or argument contained in the Respondent's Brief should not be deemed a waiver or admission of such allegation, authority or argument.

2. References to Petitioner's Brief herein will be abbreviated (Pet. Br. ___); to Respondent's Brief herein will be abbreviated (Resp. Br. ___); and to the Appendix volume herein will be abbreviated (App. ____).

3. For citations to portion of record not appearing in App. the following abbreviations will be used:

Mincey's handwritten statement appended to brief (App. Br. ___);
Trial Transcript (T.T. _____);
Grand Jury Transcript (G.J.T. ____);
Hearing Transcript January 31, 1975 (H.T.J. ____);
Hearing Transcript February 3 and 4, 1975 (H.T.F. ____).

by a neutral detached magistrate.

From the point of view of a victim, every crime is serious. Certainly, requiring a search warrant where no exigent circumstances make the obtaining of a warrant impractical, does not indicate that the alleged crime being investigated is any less serious. Requiring a search warrant where no exigent circumstances make the obtaining of a warrant impractical, in no way interferes with any interest the public may have "in the prompt apprehension of the party or parties responsible for the acts of violence" (Resp. Br. 6) or in "fast and efficient criminal investigation." (Resp. Br. 70). What requiring a search warrant does do is insure that those sworn to enforce the law will strictly obey the law of the land which protects an individual's reasonable expectation of privacy. It is a far more potent safeguard than some nebulous concept of "common sense".

Respondent argues that the police lawfully entered Mr. Mincey's home. While Petitioner does not concede that the police did lawfully enter Mr. Mincey's home,[4] it should be noted that this is an issue separate and apart from the issue of the lawfulness of the search of Mr. Mincey's home. Simply because police may lawfully enter a person's home to make an arrest does not mean that a person thereby surrenders his reasonable expectation of privacy regarding what is inside his closed drawers, what is concealed within the pockets of clothes which are not on his person, what is inside his closed medicine chest, etc. In that regard, this Court has said:

> "[W]e cannot join in characterizing the invasion of privacy that results from a top-to-bottom search of a man's house as 'minor'. And we can see no reason why, simply because some interference with an individual's privacy and freedom of movement

[4] The lawfulness of the entry herein was an issue at Mr. Mincey's first trial and will undoubtedly be an issue at his retrial on murder and assault charges. Cf. People v. Polito, 42 Ill.App.3d 372, 355 N.E.2d 725 (1976), cert. denied, sub nom. Illinois v. Polito, 98 S.Ct. 220 (1977).

has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require". Chimel v. California, 395 U.S. 752, 766 n.12 (1969).

Similarly, Fourth Amendment restraints upon the right to search do not preclude an officer's coming onto premises to render emergency aid. Cf. McDonald v. United States, 335 U.S. 451, 454 (1948). But what Mr. Mincey here challenges is the police conduct of a search which had no connection with any consideration of rendering emergency aid. Furthermore, a doctrine which permitted the "humanitarian" search for "wounded and injured" (Resp. Br. 71) would not call for looking for wounded persons inside clothes pockets, drawers, or medicine chests, etc.

Respondent argues that no harm is done by a warrantless search since a criminal defendant can challenge the lawfulness of a search prior to trial. (Resp. Br. 65-67). Of course, if the only hearing held is after a search, then the officer's recollection of circumstances impelling him to search will be colored by his knowledge of what occurred during and after the search. Cf. United States v. Martinez-Fuerte, 96 S.Ct. 3074, 3086 (1976). Such does not occur when the officer must give a sworn statement to a magistrate before any search occurs. Moreover, as this Court has stated:

> "[W]e cannot accept the view that Fourth Amendment interests are vindicated so long as 'the rights of the criminal' are'protect[ed]...against introduction of evidence seized without probable cause'. The Amendment is designed to prevent, not simply to redress, unlawful police action". Chimel v. California, 395 U.S. 752, 766 n.12 (1969).

Respondent claims the "murder scene exception" permits only limited searches. (Resp. Br. 63-68). As Petitioner has previously

noted, the search of Mr. Mincey's home was unlimited (Pet. Br. 13) and Respondent does not claim otherwise. Surely that Arizona's doctrine applies to "cases involving a death scene or the location of a serious personal injury with the likelihood of foul play" (Resp. Br. 64) does not indicate it is limited. According to the figures cited by Respondent (Resp. Br. at App. IV), there were over 20,500 murders in this country in 1974 and again in 1975 and there were over 450,000 aggravated assaults in each of those years. A doctrine which would authorize at least tens of thousands of warrantless searches every year is hardly one of limited application.

B. THE SEARCH OF MR. MINCEY"S HOME WAS NOT A SEARCH INCIDENT TO AN ARREST.

Respondent's assertion that the search here challenged was a search incident to an arrest meets with one immovable obstacle. The search of the premises was begun after the police had secured the premises (App. 27-28) and after the removal of the intermittently unconscious Mr. Mincey (App. 34-35, 41). Officers were kept on the scene 24 hours a day until the investigation was completed. App. 38. The purpose of permitting warrantless searches incident to an arrest is to permit the removal of weapons an arrestee might otherwise use to endanger the arresting officer or frustrate an arrest and to prevent the concealment or destruction of evidence within the arrestee's reach. Chimel v. California, 395 U.S. 752, 763 (1969). There is no search incident to an arrest when the arrestee has been removed from the searched premises and the premises secured by police before any search takes place.

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II

THE ADMISSION OF MR. MINCEY'S RESPONSES TO POLICE QUESTIONING MADE WHILE MR. MINCEY WAS A PATIENT IN THE INTENSIVE CARE UNIT OF A HOSPITAL VIOLATED HIS PRIVILEGE AGAINST SELF-INCRIMINATION, AND RIGHTS TO COUNSEL AND DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

Perhaps the only matter involved in this issue about which Respondent and Petitioner can agree is that this Court "should engage in a close analysis of the record", Resp. Br. 102, as Petitioner is sure it will. Of course, it is the duty of this Court to independently examine the whole record when a claim of a constitutionally protected right is invoked. E.g., Bachellar v. Maryland, 397 U.S. 564, 566 (1970); Davis v. North Carolina, 384 U.S. 737, 741-42 (1966).

Respondent argues that "no greater degree of inconsistency" is required to permit the use of [5]Miranda violative evidence "than that required by prior inconsistent statements". Resp. Br. 90. The developing case law, however, is inapposite. [6]Harris and[7]Haas were designed to deter or combat outright perjury; they were not designed to afford a carte blanche for prosecutorial use of unconstitutional evidence whenever an accused takes the witness stand nor to insinuate perjury when there is none, nor to deter accused persons from taking the witness stand on their own behalf. Cf. Agnello v. United States, 269 U.S. 20 (1925); United States v. Mariani, 539 F.2d 915, 921-24 (2d Cir. 1976). Prior Miranda violative statements which are ambiguous in terms of asserted inconsistency, though they might be sufficient to meet the ordinary rules of evidence for impeachment, are insufficient for purposes of Harris and Haas. E.g. Cf. Doyle v. Ohio, 426 U.S. 610 (1976); Minor v. Black, 527 F.2d 1, 3-4 (6th Cir. 1975), cert. denied, 427 U.S. 904 (1976); United States v. Trejo, 501 F.2d 138, 143-45 (9th Cir. 1974); People v. Taylor, 8 Cal.

[5]Miranda v. Arizona, 384 U.S. 436 (1966);
[6]Harris v. New York, 401 U.S. 222 (1971);
[7]Oregon v. Haas, 420 U.S. 714 (1975)

3d 174, 104 Cal.Rptr. 350, 501 P.2d 918 (1972), cert. denied, 414 U.S. 863 (1973); Dornau v. State, 306 So.2d 167 (Fla.App. 1974), cert. denied, 422 U.S. 1011 (1975); State v. Kidd, 375 A.2d 1105, 1112-16 (Md. App.), cert. denied, 46 U.S.L.W. 3390 (Dec. 13, 1977); People v. Wilborn, 57 Mich.App. 277, 225 N.W.2d 727 (1975); Commonwealth v. Woods, 455 Pa.1, 312 A.2d 357 (1973), cert. denied, 419 U.S. 880 (1974). More than a little ambiguity exists in the statements used in cross-examination--in the undefined reference to "the Guy" (Pet. Br. 8a) and in the use of the term "bust" (Pet. Br. 6a) after Mr. Mincey had been advised by the interrogator that the people who had swarmed into Mr. Mincey's apartment were police trying to make arrests. Prior to that response, Mr. Mincey's statement also contained the following notation: "I don't know who the police man was which one was the nark [sic]. Did he have on cowboy boots." (Pet. Br. 5a).

The issue of consistency was particularly troubling to the trial court in this case. T.T. (June 5, 1975) 208-217. The untruthworthiness of Mr. Mincey's hospital statements derives not only from his confused condition at the time the statements were made (E.g. Pet. Br. 3a, 4a and 5a; App. 92-93), but also from the fact that Mr. Mincey's responses are virtually meaningless without knowing the questions they were answering and the fact that no accurate record of the questions was kept. As Respondent concedes, Resp. Br. 33, Detective Hust made notes regarding his questions the day after the interrogation and relied for his testimony upon a report he prepared a week after the interrogation. Cf. United States v. Shoupe, 548 F.2d 636 (6th Cir. 1977). See also T.T. (June 5, 1975) 208-217.

With regard to the involuntariness of the statements, Mr. Justice White's concurring opinion in Michigan v. Mosley, 423 U.S. 96 (1975) is instructive. There it was noted:

> "[T]he accused having expressed his own view that he is not competent to deal with the authorities

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without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism". 423 U.S. 96, 110 n.2 (1975) (White, J., concurring).

Respondent lays great emphasis upon Detective Hust's testimony (Resp. Br. 34-47, 109-110 and at Appendix 1 of said brief) in an apparent attempt to show not simply that Mr. Mincey's statements were voluntary, but even that they were not obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966). It is notable that the trial court which heard Hust's testimony disbelieved his assertions that Mr. Mincey waived his rights to counsel and to remain silent and granted the motion to suppress the statements except with regard to impeachment use (App. 74); and the Arizona Supreme Court also disbelieved Hust's head nodding testimony (App. 105-106). Without Hust's asserted head nodding, that is, relying only on the statements Mr. Mincey is known to have made (since he could not speak at the time, his statements were written--Pet. Br. at 1a-9a), the evidence indicates not a waiver of rights, but a repeated invoking of the rights to counsel and to remain silent and repeated disregard of those rights by the interrogating officer. Detective Hust's testimony of head nodding by Mr. Mincey becomes even more incredible when one considers how painful such behavior would have been to a patient in the intensive care unit who had an intertracheal tube down his throat and a nasal-gastric tube down his gullet.

Respondent asserts that "there is no evidence of what the effects" of the drugs given Mr. Mincey at the time he was admitted to the hospital were (Resp. Br. 115-116), but Respondent also notes that "[i]n the presence of physical dependence on narcotics, Narcan will produce withdrawal symptoms". Resp. Br. 49 and at Appendix III of said brief. If anything, this indicates yet another source of pain and stress lowering Mr. Mincey's will to resist. The drugs

administered must have produced withdrawal symptoms since there is ample evidence of Mr. Mincey's heroin addiction and his requests to the Air Force for treatment. E.g. App. 109; T.T. (June 5, 1975) at 159, 189, 200; T.T. (June 6, 1975) at 267-272, 304. The parties agree that Narcan was administered within three or four hours of the interrogation. Pet. Br. 6; Resp. Br. 31; App. 43-44.

CONCLUSION

Petitioner continues to rely on all matters raised in his opening brief. For the reasons expressed therein and for the foregoing reasons, the judgment of the Arizona Supreme Court should be reversed and this Court should hold the admission at Mr. Mincey's trial of evidence obtained in the search of Mr. Mincey's residence and of evidence obtained in the in-hospital interrogation denied Mr. Mincey due process of law.

Respectfully submitted this 15th day of February, 1978.

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February, 1978

AFFIDAVIT OF SERVICE OF BRIEF

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

RICHARD OSERAN, being first duly sworn, deposes and says: That he is one of the attorneys for the Petitioner in the above-entitled action, and that on the 15th day of February, 1978, he served three copies of the foregoing Reply Brief for the Petitioner on:

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RICHARD OSERAN, ESQ.

SUBSCRIBED AND SWORN TO before me this 15th day of February, 1978, by RICHARD OSERAN.

Patricia A. Barbosky
Notary Public

My Commission Expires:
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